(26,345)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 878.

CAPITAL TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF THOMAS N. ARNOLD, DECEASED, PLAINTIFF IN ERROR,

vs.

C. C. CALHOUN.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 4, 1918.

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1 Be it remembered that on the 20th day of March, 1917, the Appellant by attorney filed in the office of the Clerk of the Court of Appeals an appeal styled T. N. Arnold's Admr., Appellant vs. C. C. Calhoun, &c., Appellee, which record is in words and figures as follows:

2 Franklin Circuit Court.

Pleas before the Honorable Robert L. Stout, Judge of the Franklin Circuit Court, at the Court House in the City of Frankfort, County of Franklin and State of Kentucky, and on the dates hereinafter mentioned.

FANNIE P. ARNOLD, Plaintiff,

vs.

CAPITAL TRUST COMPANY, Defendant.

Be it remembered, that heretofore, to-wit: on the twenty-fourth day of March, 1914, came the plaintiff by counsel and filed its petition herein, Said petition is in words and figures as follows, to-wit:

3 Franklin Circuit Court.

FANNIE P. ARNOLD Plaintiff,

vs.

CAPITAL TRUST COMPANY, Admr. de bonis non of Thomas N. Arnold, Deceased, Defendant.

Petition in Equity.

Plaintiff, Fannie P. Arnold, says that Thonas N. Arnold departed this life a resident and citizen of Franklin County, Kentucky, on the — day of August, 1909. That thereafter Thomas N. Arnold, Jr. was appointed his administrator but that he did not as such administrator fully administer the estate of said Thimas N. Arnold. Afterward Capotal Trust Co., which is a corporation of Kentucky authorized by its charter to act as personal representative and to administer the estates of deceased persons, was by the County Court of Franklin County on 3rd day of March, 1915, duly appointed administrator de bonis non of said Thomas N. Arnold. That said Capital Trust Co. accepted the appointment, executed bond,
4 took the oath of office and was in every respect duly qualified as administrator de bonis non of said estate, and is now act-

ing as such. A copy of the letters of administration will be filled if required.

She sats that Thomas N. Arnold owes no debts of which she has any knowledge. That there is in the hands of the said Capital Trust Co., administrator de bonis non, about fifteen hundred and four dollars for distribution. She says that Thomas N. Arnold left plaintiff who is his widow and several children all of whom were of the age of twenty-one years at the time of his death, and that they have all united in assigning to this plaintiff all their interest in the fund which is in the hand- of said Capital Trust Co. and that at present no one has any interest in this fund save the plaintiff. She says that said Capital Trust Co. has declined to pay her said sum or any part thereof. She says that there is no other estate belonging to said Thomas N. Arnold.

Wherefore, she prays that this action be referred to the Master Commission of the Franklin Circuit Court, to ascertain and report the amount of debts, if any, against the estate of Thomas N. Arnold, and to settle with the defendant Capital Trust Company as administrator de bonis non of the estate of Thomas N. Arnold deceased; that the sosts of this action and of the administration be paid and that this estate be settled and distributed.

O'REAR & WILLIAMS,
Att'ys for Plaintiff.

5 Charleston, S. C.

Resignation.

Know all men by these presence that I, Thomas N. Arnold, Jr., Administrator in the claim suit of Mrs. Frances P. Arnold of Frankfort, Ky., vs. U. S. Government, at Washington, D. C., do hereby resign said administratorship.

THOS. N. ARNOLD.

Sworn to before me this 6th Aprol, 1915.
WM. H. DUNKIN, *C. C. C. P.*

Witnesseth:

6 Thereupon on the 20th day of March, 1916 the clerk issued the following summons:

The Commonwealth of Kentucky, The Sheriff of Franklin County, Greeting:

You are commanded to summon Capital Trust Company to answer in 10 days after the service of the summons, a petition in equity filed against them in the Franklin Circuit Court by Fannie P. Arnold, and warn them that upon failure to answer, the petition will be taken for confessed, or they will be proceeded against for contempt, and you will make due return of this summons within 10 days after the service thereof to the Clerk's Office of said Court.

Witness, Kelly C. Smither, Clerk of said Court, this 20th day of March, 1916.

KELLY C. SMITHER, *Clerk*,
By MILDRED ZIMMERMAN, *D. C.*

The return of the sheriff on the foregoing summons is as follows: Executed on the Capital Trust Co. by delivering to T. L. Edelen, President of said Bank a true copy hereof this March 21st, 1916.

N. B. SMITH, *S. F. C.*
By J. A. LILLIS, *D. S.*

7 At a court held on the 3rd day of April, 1916, the following order was entered:

FANNIE P. ARNOLD, Plaintiff,

vs.

CAPITAL TRUST COMPANY, Defendant.

Order.

It is ordered that all persons having claims against the estate of Thomas N. Arnold deceased shall appear before the Master Commissioner of the Franklin Circuit Court on or Before the 10th day of April, 1916, and prove their claims and present them for allowance to the Master Commissioner of the Franklin Circuit Court.

At a court held on the 8th day of April, 1916, the following order was entered:

FANNIE P. ARNOLD, Plaintiff,

vs.

CAPITAL TRUST CO., Defendant.

Order.

This day came Calhoun and Sizer and C. C. Calhoun and tendered petition which is ordered filed and taken as their answer and same is made a cross-petition against the Capital Trust Company as
8 administrator de bonis non of Thos. N. Arnold, deceased.

The petition, answer and cross-petition referred to in the foregoing order also exhibits are as follows:

Court of Claims.

Congressional, No. 13681.

THOMAS N. ARNOLD, JR., Administrator of the estate of Thomas N. Arnold, Deceased,

vs.

THE UNITED STATES.

I, Samuel A. Putman, Chief Clerk Court of Claims, certify that the annexed (five pages) are true copies of the findings of fact and conclusion filed by the court; of the withdrawal of appearance of Calhoun & Sizer; of the appearance of C. C. Calhoun, on file in this office in the above entitled cause.

In testimony thereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 10th day of April, A. D. 1916.

SAMUEL A. PUTMAN,
Chief Clerk Court of Claims.

[SEAL.]

I, Edward K. Campbell, Chief Justice of the Court of Claims, certify that Samuel A. Putman, whose signature is affixed to the foregoing certificates, is the Chief Clerk of said Court, and that said certificate is in due form, and entitled to full faith and credit.

9

In testimony whereof, I have hereunto subscribed my name this 10th day of April, A. D., 1916.

EDWARD K. CAMPBELL,
Chief Justice.

I, Samuel A. Putman, Chief Clerk of the Court of Claims, certify that Edward K. Campbell, Chief Justice of the Court of Claims, whose signature is affixed to the foregoing was at the time of signing the said certificate Chief Justice of the Court of Claims.

In testimony thereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 10th day of April, A. D., 1916.

SAMUEL A. PUTMAN,
Chief Clerk Court of Claims.

[SEAL.]

(Court of Claims. Congressional, No. 13681. Thomas N. Arnold, Jr., administrator of the estate of Thos. N. Arnold, v. The United States.)

Tucker Act—Statement.

On May 22, 1908, Senate Bill 3860, Sixtieth Congress, was referred to this court by resolution of the United States Senate for findings of fact under the terms of the act approved March 3, 1887. Said bill reads as follows:

"Be it enacted by the Senate and House of Representatives of the

United States of America in Congress assembled, That the Secretary of the Treasury be, and he is Hereby, authorized and
10 directed to pay, out of any money in the Treasury not otherwise appropriated, the sum of forty thousand dollars to Thomas N. Arnold, of Frankfort, Kentucky, in full compensation for property taken and used, and for the use and occupancy of real estate, by the United States Army, in Kenton County, Kentucky, during the Civil War of Eighteen Hundred and sixty-one to eighteen hundred and sixty-five."

The claimant, in his petition, makes the following allegations:

1. That he is a citizen of the United States, residing in the county of Franklin, State of Kentucky, and that he is the duly appointed, qualified, and acting administrator of the estate of Thomas N. Arnold, deceased, late citizen of the United States and a resident of said county and State.

2. That during the late Civil War said decedent, Thomas N. Arnold, was the owner of a tract of land situated on Covington Heights, in the county of Kenton, State of Kentucky, containing 115 acres, more or less, improved by a fine residence, outbuildings, shade trees, and orchard, the remainder thereof being partly woodland; that said land and improvements were of the reasonable value of $60,000.

3. That in or about the month of August, 1863, by authority of Gens. Lew Wallace and Green Clay Smith, the United States military forces took possession of said premises, erected forti-
11 fications, and dug rifle pits and intrenchments thereon, and used and occupied the residence and outbuildings belonging thereto as headquarters and for other Army purposes, said use and occupancy thereof continuing until about September, 1863; that the reasonable rental value of said premises during said period of occupancy was the sum of $6,000; that the damage to said land and improvements, incident to such use and occupation, in excess of ordinary wear and tear, was the sum of $10,000, for which no payment has been made.

4. That during the occupancy of said premises said military forces, by proper authority, took from said decedent, for their use, quartermaster stores and commissary supplies of the kinds and values below mentioned, for which no payment has been made, to-wit:

25 tons of timothy hay, at $20	$500.00
2 carriage horses and 1 fine saddle horse	$450.00
20 acres of corn, averaging 12 barrels, at $4	$960.00
6 registered Alderney or Jersey milch cows and 1 Alderney bull at $30	$210.00
30 Bushels of corn in crib, at $1	$30.00
1,500 cords of timber, at $3	$4,500.00
50 bushels of potatoes, at $1	$50.00
5 blankets, 2 quilts, pillows, sheets, counterpanes, and kitchen ware	$200.00
Total	$6,900.00

5. That shortly after the close of the Civil War said decedent consulted an attorney at Covington, Ky., with view of filing
12 his claim, was advised that at the Government has been deluged with claims, to defer the presentation of the same until there had been a substantial settlement of the numerous claims already filed, thus affording a more favorable opportunity for the collection of his claim; that decedent followed this advice of counsel and accordingly did not present his claim to the Quartermaster General under the act of July 4, 1864; that when the State of Kentucky collection its Civil War claim from the United States, several years since, said decedent was advised by said attorneys to begin the prosecution of his claim and thereupon placed the same in the hands of counsel for collection; that said claim was thereafter made the subject of bills in both branches of Congress, and on May 22, 1908, Senate bill 4860, Sixtieth Congress, first session, entitled "A bill for the relief of Thomas N. Arnold", was referred to this honorable court by resolution of the United States Senate under the provisions of section 14 of the act approved March 3, 1887, and commonly known as the Tucker Act.

The case was brought to a hearing on loyalty and merits on January 11, 1912.

C. C. Calhoun, Esq., appeared for the claimant, and the Attorney General, by W. F. Morris, Esq., his assistant and under his direction, appeared for the defense and protection of the interests of the United States.

13 The court upon the evidence adduced, and after considering the briefs and arguments of counsel on both sides, makes the following:

Findings of Fact.

1. The claimant's decedent, Thomas N. Arnold, was loyal to the Government of the United States throughout the late Civil War.

2. During said war the military forces of the United States, by proper authority, took possession of, used and occupied the real estate described in the petition, in Kenton County, Ky., and also took from claimant's decedent in said county and State stores and supplies as described in the petition. The reasonable rental value of said real estate, together with damages thereto in excess of ordinary wear and tear, and the value of the stores and supplies so taken was the sum of five thousand and fifteen dollars ($5,015), no part of which appears to have been paid.

3. That claim herein was never presented to any officer or department of the Government prior to its presentation to Congress and reference to the court by resolution of the United States Senate, as set forth in the statement of the case, and no reason is given why the same was not earlier presented, except the decedent's widow testified that attorneys were consulted, who advised delay in prosecution.

14 *Conclusions.*

Upon the foregoing findings of fact the court concludes that the claim herein is an equitable one in the sense that the United States received the benefit of the supplies and the use of the property for which claim is made.

BY THE COURT.

Indorsed: Court of Claims, Congressional Case No. 13681. Thomas N. Arnold, Jr., admr. of Thomas N. Arnold, deceased, v. The United States. Finding of Fact. $5,015. Filed January 15, 1912. Court of Claims.

In the Court of Claims.

No. 13,681, Congressional.

THOMAS N. ARNOLD,

v.

THE UNITED STATES.

Withdrawal of Appearance.

Notice is hereby given of the withdrawal of our appearance as attorneys for claimant in the above entitled cause.

CALHOUN & SIZER,
By C. C. CALHOUN,
Attorneys for Claimant.

15 Indorsed: In the Court of Claims. No. 13,681 Congressional. Thomas N. Arnold, v. The United States. Withdrawal of Appearance. Calhoun & Sizer, Attorneys for Claimant. Filed September 25th, 1909, Court of Claims.

In the Court of Claims.

No. 13,681, Congressional.

THOMAS N. ARNOLD, JR., Administrator of the Estate of Thomas N. Arnold, Deceased,

v.

THE UNITED STATES.

Appearance.

Notice is hereby given of my appearance as attorney for claimant in the above entitled cause.

C. C. CALHOUN,
Attorney for Claimant.

Indorsed: In the Court of Claims. No. 13,681 Congressional. Thomas N. Arnold, Jr., Admr. Thomas N. Arnold, deceased v. The United States. Appearance. C. C. Calhoun. Filed. September 25, 1909. Court of Claims.

16 "G."

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
APRIL 11, 1916.

Pursuant to Section 882 of the Revised Statutes I hereby certify that the annexed is a photographic copy of acquittance filed by C. C. Calhoun as attorney in the case of the Capital Trust Company of Frankfort, Kentucky, successor to Thomas N. Arnold, Jr., Administrator of the estate of Thomas N. Arnold, deceased, which claim was appropriated for by Act of Congress approved March 4, 1915. (Public No. 289. 63rd Congress) the original of which is on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

WM. P. MALBURN,
Assistant Secretary of the Treasury.

[SEAL.]

17

WASHINGTON, D. C., June 7, 1915.

I hereby request the Secretary of the Treasury of the United States to issue a warrant in the sum of one thousand and three dollars ($1,003.00), payable to me on account of services as attorney in the claim of Capital Trust Company of Frankfort, Kentucky, successor to Thomas N. Arnold, Jr., administrator of Thomas N. Arnold, deceased, late of Kenton, Kentucky, against the United States, as appropriated for by the Act of Congress approved March 4, 1915, (Public No. 289) the receipt of said warrant by me to be taken and accepted as a full and final release and discharge of any claim I may have against the United States on account of services as attorney in said claim.

C. C. CALHOUN.

18

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
APRIL 10, 1916.

Pursuant to Section 882 of the Revised Statutes I hereby certify that the annexed is a photographic copy of power of attorney filed by C. C. Calhoun as attorney in the case of the Capital Trust Company of Frankfort, Kentucky, successor to Thomas N. Arnold, Jr., administrator of the estate of Thomas N. Arnold, deceased, which claim was appropriated for by Act of Congress approved March 4, 1915, (Public No. 289, 63rd Congress) the original of which is on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the

seal of the Treasury Department to be affixed, on the day and year first above written.

WM. P. MALBURN,
[SEAL.] *Assistant Secretary of the Treasury.*

19 *Power of Attorney.*

Know all men by these presents, That Capital Trust Company, a corporation created and existing under and by virtue of the laws of the State of Kentucky, and having its principal office, for the transaction of business, in the City of Frankfort, in said State, administrator of the estate of Thomas N. Arnold, deceased, late of the County of Franklin, in said State, does hereby request the Secretary of the Treasury of the United States, to issue a warrant in the sum of Four thousand twelve dollars (4,012.00), payable to said Capital Trust Company, on account of its claim as administrator of said estate against the United States, as appropriated for in the name of Thomas N. Arnold, Junior, administrator of said estate, in the Act of Congress approved March 4, 1915, (Public No. 289), in the sum of Five thousand and fifteen dollars ($5,015.00); which said claim was case No. 13681 Congressional in the Court of Claims; the said warrant to be forwarded to the office of said company at Frankfort, Kentucky.

And it does further authorize and request the Secretary of the Treasury to issue a further warrant in the sum of One thousand and three dollars ($1,003.00), payable to C. C. Calhoun, said warrant being on account of services rendered as attorney in the prosecution of the above-mentioned claim.

And it does hereby make, constitute and appoint said C. C. Calhoun its true and lawful attorney, for it and in its name, place and stead, to receive and receipt for said last-mentioned warrant; said two warrants together to constitute a full and complete settlement by and acquittance of the United States in the matter of
20 said claim as appropriated for by said Act of Congress.

In testimony whereof, the said company has caused these presents to be signed by its President, and its corporate seal to be hereunto affixed this 21st day of May, A. D. 1915.

CAPITAL TRUST COMPANY,
By W. H. POSEY,
Vice President.

STATE OF KENTUCKY,
County of Franklin, ss:

Be it known that on this 21st day of May, A. D. 1915, before me, a Notary Public in and for the County and State aforesaid, personally appeared W. H. Posey, Vice President of Capital Trust Company, personally and well known to me to be such, and did acknowledge that he had signed the foregoing power of attorney as President of and on behalf of said Capital Trust Company, and had caused its corporate seal to be thereto affixed for the purposes in the said in-

strument set forth; and I do hereby certify that the said power of attorney was read and fully explained to the said W. H. Posey, at the time of acknowledgment.

In witness whereof I have hereunto set my hand and affixed my seal the day and year last above written.

W. D. FURR,
Notary Public.

21 [Endorsed:] In Re Claim of Estate of Thomas N. Arnold, deceased. (Act of March *March* 4, 1915. Public No. 289, page 8). Power of Attorney. Received Jun- 8—1916. Office of Auditor for War Department. Law Offices C. C. Calhoun, Evans Building, Washington, D. C.

22 This Agreement, made and entered into between Thos. N. Arnold, of the first part, and C. C. Calhoun and Adrian Sizer of the firm of Calhoun and Sizer, of the second part,

Witnesseth, that the party of the first part hereby employes the parties of the second part as his attorneys to prosecute and "A" collect any claim or claims he may have against the United States, arising out of any act of Congress, or any regulation of an Executive Department, or upon any contract, expressed or implied, or any claim which the parties of the second part may have discovered or developed, or may hereafter discover or develop, amounting to such sums, and for such purposes, as may be hereafter ascertained.

And in consideration of the services rendered and to be rendered by the parties of the second part and others whom they may employ in the prosecution of said claim or claims, the party of the first part agrees and hereby binds himself, his heirs and legal representatives, to pay to the parties of the second part, their heirs or legal representatives, a fee equal in amount to Fifty per centum of whatever sum of money or other evidence of indebtedness may be awarded or collected on account of said claim or claims, the payment of which is hereby made a lien upon said claim and upon any draft, money, or other evidence of payment that may be issued in liquidation thereof.

23 In witness whereof, we have hereunto affixed our hands and seals this first day of August, 1905.

THOMAS N. ARNOLD, [SEAL.]
CALHOUN & SIZER, [SEAL.]
By C. C. CALHOUN.

Witness:
W. L. JETT.

Present address of claimant: Frankfort, Ky.

Fee Agreement.

This Agreement Witnesseth:

That I, Thomas N. Arnold, Jr., Administrator of the estate of Thomas N. Arnold, deceased, have employed C. C. Calhoun, of Washington, D. C., as my attorney to prosecute my claim against the Government of the United States for the use and occupa-
"B" tion of and damage to real estate belonging to, and for the value of stores and supplies taken from Thomas N. Arnold, deceased, by the Federal forces during the late Civil War, being pending Case No. 13681 Congressional before the United States Court of Claims, and in consideration of his professional services in the prosecution of said claim I hereby agree and bind my heirs and legal representativs, to pay to him, as heirs or legal representatives as a fee a sum equal to Fifty per cent (50%) of the amount
24 which may be collected upon said claim, said fee to be a lien on any warrant which may be issued in payment of said claim.

Witness my hand and seal this 21st day of September, 1909, in the County of Franklin, State of Kentucky.

THOMAS N. ARNOLD, JR.,
Administrator of the Estate of Thomas N. Arnold.

Witness- to signature:

FRANCES P. ARNOLD,
GLENDY B. ARNOLD.

Notice of Allowance of Claim.

S. B. T. 412.

Claim No. 534171.

TREASURY *of* DEPARTMENT,
OFFICE OF AUDITOR FOR THE WAR DEPARTMENT,
WASHINGTON, D. C., Jul- 1, 1915.

C. C. Calhoun, Attorney, Evans Building, Washington, D. C.:

The claim of the Capital Trust Company, Administrator de bonis non (successor to Thomas N. Arnold, Jr.) of the estate of Thomas N. Arnold, deceased, late of Kenton County, Kentucky, for payment for use and occupation of real e-tate, and for supplies taken by the military forces of the United States during the Civil War, (Public act 289, approved Mar. 4, 1915, p. 8.) received in this office June 8, 1915, has been allowed as shown in the following state-
25 ment, and settlement-certificate No. 110985 dated July 1, 1915, has this day been forwarded to the Secretary of the Treasury for payment.

	Amount claimed.	As settled.
To Capital Trust Company, administrator de bonis non (successor to Thomas N. Arnold, Jr.) of the estate of Thomas N. Arnold, deceased	5015 00	4012 00
To C. C. Calhoun, Attorney		1003 00

Respectfully,

J. L. BAITY,
Auditor,

By W. H. B.

S.

"Any person accepting payment under settlement by an Auditor shall be thereby precluded from obtaining a revision of such settlement as to any items upon which payment is accepted. * * * Any persons whose accounts may have been settled by an Auditor of the Treasury Department * * * may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive." Section 8, Act July 31, 1894.

26 WASHINGTON, D. C., July 2, 1915.

Capital Trust Company of Frankfort, Ky., Administrator of the Estate of Thomas N. Arnold, Dec'd, To C. C. Calhoun, Dr.

To services rendered in prosecuting and collecting the claim of the estate of Thomas N. Arnold, deceased vs. The United States, being case No. 13681 Congressional in the Court of Claims, and heretofore allowed by said Court and appropriated for by Congress in the sum of $5015, as per contract, a copy of which is herewith attached	2507.50
By Treasury Warrant on account of services	1003.00
Balance	$1504.50

"H"

C. C. Calhoun, being first duly sworn according to law, deposes and says: That the above account against the estate of Thomas N. Arnold, deceased, is a just demand and has not been paid; that there is no offset or discount against the same, and no usury enforces therein, and that all just credits have been allowed.

[SEAL.] C. C. CALHOUN.

Subscribed and sworn to before me this 2nd day of July, A. D. 1915.

FRANCIS L. NEUBECK.

27 *Fee Agreement.*

This agreement witnesseth:

That I, Thomas Arnold, Jr., Administrator of the estate of Thomas N. Arnold, deceased, have employed C. Calhoun, of Washington, D. C., as my attorney — prosecute my claim against the Government of the United States for the use and occupation of and damage to real estate belonging to, for the value of stores and supplies taken from Thomas N. Arnold, deceased, by the Federal forces during the late Civil War, being pending Case No. 13681 Congressional before the United States Court of Claims, and in consideration of his professional services in the prosecution of said claim I hereby agree and bind my heirs and legal representatives, to pay to him, his heirs or legal representatives as a fee a sum equal to Fifty per cent (50%) of the amount which may be collected upon said claim, said fee to be a lien on any warrant which may be issued in payment of said claim.

Witness my hand and seal this 21st day of September, 1909, in the County of Franklin, State of Kentucky.

THOMAS N. ARNOLD, JR.,
Administrator of the Estate of
Thomas N. Arnold.

Witnesses to signature:

FRANCES P. ARNOLD.
GLENBY B. ARNOLD.

28 FANNIE P. ARNOLD, Plaintiff,

vs.

CAPITAL TRUST COMPANY, Defendant.

The petitioner, C. C. Calhoun, and Calhoun & Sizer, a firm composed of C. C. Calhoun and Adrin Sizer, say they are necessary parties to this suit. They say that on August 1st, 1905, C. C. Calhoun and Adrain Sizer were practicing law in partnership under the firm name of Calhoun & Sizer; that C. C. Calhoun is and was then a resident of the State of Kentucky and an attorney at law practicing in the city of Washington; that Adrin Sizer is and was then an attorney at law practicing in the City of Washington; that Thomas N. Arnold for many years prior to his death was a citizen and resident of Franklin County, Kentucky, believing that he had a just claim against the United States Government for the rent of certain real estate and for the value of certain stores and supplies seized and used by the Government, the said Arnold employed the said firm of Calhoun & Sizer to undertake the prosecution of said claim and entered into on August 1st, 1905, a written contract with them by

which in consideration of the services rendered and to be rendered by them in the prosecution of said claim he agreed to pay
29 them a fee equal in amount to 50% of whatever sum of money should be awarded or collected on said claim, the payment of which was made a lien upon said money or upon any draft or evidence of payment that might be issued in liquidation thereof. Said contract was reduced to writing and signed by said Thomas N. Arnold and Calhoun & Sizer and was delivered by him to them. Said original contract is filed herewith and made a part hereof marked "A"; they say that thereupon said Calhoun and Sizer undertook the prosecution of said claim, prepared proofs and briefs and caused them to be prepared and gave advice to said Arnold as to how to proceed with getting the necessary evidence in support of said claim; that bills were introduced in Congress providing for the payment of said claim and on May, 22nd 1908, said claims was duly referred to the Court of Claims by a resolution of the United States Senate; that about this time the firm of Calhoun & Sizer was dissolved and in the dissolution this claim by agreement between them fell to C. C. Calhoun, and in the month of November, 1908, the said Thomas N. Arnold having died the beneficiaries of the estate were notified that said firm of Calhoun & Sizer had been dissolved and that C. C. Calhoun alone would continue with the prosecution of said claim; after this Thomas N. Arnold, Jr., was by the County Court of Franklin County, Kentucky, duly appointed and qualified as administrator of the estate of said Thomas N. Arnold and to conform the contract previously made with
30 Thomas N. Arnold, deceased, the said administrator on the 21st day of September, 1909, executed and delivered to said C. C. Calhoun a writing whereby he agreed to pay him for his services in prosecuting said claim a sum equal to 50% of the amount which might be collected, said fee to be a lien thereon. The said writing is filed herewith as part hereof marked "B". After the dissolution of the firm of Calhoun & Sitzer an order was entered in the Court of Claims withdrawing the appearance of Calhoun & Sizer as attorneys for the claimant, and an order was entered entering the appearance of C. C. Calhoun as attorney for the claimant. Copies of said orders are filed herewith as part hereof marked "C" and "D". They say that said Calhoun & Sizer until the dissolution of said firm and said C. C. Calhoun thereafter diligently prosecuted said claim; that he took a large amount of proof in different parts of the United States, and that on the 11th day of January, 1912, the plaintiff submitted said claim for decision to the Court of Claims, and on the 15th day of January, 1912, said Court rendered a decision, in the matter of said claim, and allowed the estate of said Thomas N. Arnold, deceased, the sum of $5015.00. A certified copy of said decision is filed herewith as part hereof marked "E". On motion of the plaintiff said findings and conclusions were certified to Congress on the 17th day of January 1912. By Act approved March 4th, 1915, (Public No. 289, 63rd Congress), an appropriation was made for the payment of said claim in accordance with said allow-
31 ance of the Court of Claims, said Act being the first appropriation by Congress for the payment of such Civil War

Claims as the one under consideration since the Act of Congress of February 24th, 1905. Said Act contained the following provisions:

"That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to claimants in this Act named the several sums appropriated herein, the same being in full for and the receipt of the same to be taken and accepted in each case as a full and final release and discharge of their respective claims, except that claimants under this Act receiving compensation for use and occupancy of property shall not be barred from further prosecution of claims arising from damages or destruction of the same property."

"That in case of the death of any claimant, or the death or discharge of the executor or administrator of any claimant herein named, payment of such claims shall be made to the legal representative."

"That no part of the amount of any item appropriated in this bill in excess of twenty per centum thereof shall be paid or delivered to or received by any agent or agents, attorney or attorneys on account of services rendered or advances made in connection with said claim.

32 It shall be unlawful for any agent or agents, attorney or attorneys to exact, collect, with-old or receive any sum which in the aggregate exceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding $1,000."

Afterwards on July 1st 1915, notice was given to C. C. Calhoun as attorney for the claimant that in settlement of the claim a check was mailed to him by the United States for $1003.00, being 20% of the claim and to the Capital Trust Company as administrator de bonis non of Thomas N. Arnold, deceased, for $4012.00, which payments were made as directed by the claimant. Said notice is filed herewith as part hereof marked "F". They say that no part of said fee except said sum of $1003.00 has been paid and that there is a balance due of $1504.50 with interest from July 1st, 1915, when said money was received by said Capital Trust Company. They say that on or about the 10th day of July, 1915, they presented said claim duly proved to the said Capital Trust Company and demanded payment, which was refused, and that the whole of said sum of $1504.50 remains due and unpaid; that they have a

23 lien on said fund for the payment of the balance of said fee; that they accepted the check from the United States for $1003.00 under protest only on account and not waiving their rights to claim the balance of the fee but insisting on said at the time; that their contract having been made many years before the said Act of Congress was passed and when such contracts were lawful, Congress was without authority to take from them their property without due process of law or just compensation therefor or to deprive them of their liberty to contract; that said claim of said

Thomas N. Arnold against the United States was for compensation for his property taken from him by the United States which compensation had not been made to him but had been refused until the allowance of said claim as aforesaid; and that by the decision of the Court of Claims aforesaid the amount to which he was entitled from the United States was fixed and under the written contracts aforesaid the plaintiff had a vested right from that time to a fee equal to one-half of the sums paid upon said claim and this right Congress was without power under the constitution of the United States to impair or take from them; that the same Congress that passed said Act appropriated money for the poyment of other like claims without making any stipulation as to the attorneys fees, and that the attempted restriction placed in said Act as to the particular claims named therein was an unreasonable and unwarranted discrimination or attempted discrimination by Congress against these defend-
34 ants and was void. They say that they are and were at all times above referred to attorneys authorized to practice in the Court of Claims and practicing in said Court and that they were authorized by the provisions of Section 823, United States Revised Statutes, to make contracts for the fee and that although millions of dollars have heretofore been appropriated to pay allowances made by the Court of Claims in similar claims Congress has never attempted in any of said previous Appropriations Acts to regulate the fees of attorneys and has never heretofore questioned the validity of contracts fixing the attorneys fees in such cases; that the contracts above referred to were made by them in view of and pursuant to the said authority of the Acts of Congress and being valid contracts when made cannot be invalidated by a subsequent Act of Congress after all the services contracted for had been performed and the rights of the attorneys to their fee had become fixed.

The petitioners further say that the above-quoted provisions of said Act of Congress approved March 4, 1915, attempting to limit the amount to be paid to attorneys, in legal effect would operate to deprive petitioners of their property and property rights, as well as of their liberty to enforce a valid contract, without due process of law, all in contravention of the terms of the Fifth Amend-
35 ment to the Constitution of the United States; for which reasons petitioners allege said attempted limitation of attorneys fees by said act to be null and void.

They say that when said $1003.00 was paid by the United States, said C. C. Calhoun gave a receipt therefor to the United States stating therein that said $1003.00 was paid on account of services as attorney and that same was only an acquittance to the United States of the liability of the United States to them. A certified copy of said receipt which was accepted by the United States is filed herewith as part hereof marked "G".

They file herewith as part hereof said proof of claim presented to the administrator as aforesaid marked "H", and made part hereof. They make this answer a cross-petition against the Capital Trust Company as administrator de bonis non of Thomas N. Arnold, deceased, and on final hearing pray judgment against it for the sum

of fifteen hundred and four dollars and fifty cents with interest from July 10th, 1915, and costs and all proper relief.

J. P. HOBSON & SON,
Attorneys for Defendants.

C. C. Calhoun says he believes the above statements to be true.

C. C. CALHOUN.

Subscribed and sworn to before me this 8th day of April, A. D. 1916.

FRANCIS L. NEUBACK,
Notary Public.

36 WASHINGTON, D. C., June 7, 1915.

I hereby request the Secretary of the Treasury of the United States to issue a warrant in the sum of one thousand and three dollars ($1,003.00), payable to me on account of services as attorney in the claim of Capital Trust Company of Frankfort, Kentucky, successor to Thomas N. Arnold, Jr., administrator of Thomas N. Arnold, deceased, late of Kenton County, Kentucky, against the United States, as appropriated for by the Act of Congress approved March 4, 1915 (Public No. 289), the receipt of said warrant by me to be taken and accepted as a full and final release and discharge of any claim I may have against the United States on account of services as attorney in said claim.

C. C. CALHOUN.

At a court held on the 13th day of April, 1916, the following order was entered:

FANNIE P. ARNOLD, Plaintiff,

vs.

CAPITAL TRUST COMPANY, Defendant.

Came the defendant, Capital Trust Company by attorney, and filed a demurrer to the cross-petition of C. C. Calhoun.

37 The demurrer referred to in the foregoing order is as follows:

FANNIE P. ARNOLD, Plaintiff,

vs.

CAPITAL TRUST COMPANY, Defendant.

Demurrer.

Comes the Capital Trust Company and demurs to the cross-petition, of C. C. Calhoun, because the same does not state a cause of action against it.

T. L. EDELEN,
For the Capital Trust Company.

At a court held on the 20th day of April, 1916, the following order was entered:

FANNIE P. ARNOLD, Plaintiff,

vs.

CAPITAL TRUST COMPANY, Defendant.

Motion.

Comes the plaintiff and moves the Court to require the intervening petitioners to elect whether they rely on the alleged contract by Thomas N. Arnold with Calhoun & Sizer, and of date August 1, 1905, or on the alleged contract made by Thomas N. Arnold, Jr., Administrator, with C. C. Calhoun, made as is charged, the 21st day of September, 1909.

At a court held on the 20th day of April, 1916, the Following order was entered:

38 FANNIE P. ARNOLD, Plaintiff,

vs.

CAPITAL TRUST COMPANY, Defendant.

Motion.

Come cross-plaintiffs, Calhoun & Sizer and C. C. Calhoun, and moved the court to dismiss so much of the cross-petition as asserts a lien on the farm in the hands of the Trust Company without prejudice to which plaintiff objects. Motion sustained and plaintiff excepts, and the case being heard on the demurrer to the cross-petition the court takes time.

At a court held on the 20th day of April, 1916, the following order -as entered:

FANNIE P. ARNOLD, Plaintiff,

vs.

CAPITAL TRUST COMPANY, Admr., Defendant.

Order.

It is ordered that plaintiff may interline on the face of the petition and caption thereof the following "Admr. de bonis non of Thos. N. Arnold, deceased."

The motion of plaintiff and entered in by defendant to require C. C. Calhoun to elect whether he would proceed on the
39 alleged contract with Thos. N. Arnold, or upon the alleged contract with Thos. N. Arnold, Jr., Admr. of Thos. N.

Arnold, being heard, said motion is overruled to which both plaintiff and defendant except.

At a court held on the 22nd day of April, 1916, the following order was entered:

FANNIE P. ARNOLD, Plaintiff,

vs.

CAPITAL TRUST COMPANY, Admr., Defendant.

The matters of law arising upon the defendant's demurrer to the cross-petition of C. C. Calhoun coming on to be heard and the Court being sufficiently advised overrules the said demurrer to which ruling of the court the defendant objects and excepts.

At a court held on the 26th day of April, 1916, the following order was entered:

40 FANNIE P. ARNOLD, Plaintiff,

vs.

CAPITAL TRUST COMPANY, Admr., Defendant.

Came the Capital Trust Company, Admr. de bonis non and filed answer to the cross-petition of C. C. Calhoun.

The answer referred to in the foregoing order is as follows:

FANNIE P. ARNOLD, Plaintiff,

vs.

CAPITAL TRUST COMPANY, Defendant.

Answer to Cross-Petition of C. C. Calhoun.

The Capital Trust Company, Administrator d. b. n. &c. made defendant to the intervening and cross-petition of C. C. Calhoun, in answer to said intervening petition states:

It admits the execution of the written contract between Thomas N. Arnold and the firm of Calhoun and Sizer, as set out in the petition, answer, counter-claim and cross-petition of C. C. Calhoun.

It admits that the firm of Calhoun and Sizer undertook
41 the prosecution of the claim of T. N. Arnold against the United States and rendered services in the prosecution of same against the said the United States.

It admits that the claim was by a resolution of the United States Senate referred to the Court of Claims as set out in the intervening petition.

It admits the death of Thomas N. Arnold as set out in the pleading to which this is a response; and it further admits that Thomas N. Arnold, Jr., was duly appointed and qualified as administrator of

the estate of said Thomas N. Arnold, by the County Court of Franklin County, Kentucky; and that said court had jurisdiction to appoint and qualify him as administrator of the estate of Thomas N. Arnold, deceased.

It admits the execution of the contract with C. C. Calhoun by Thomas N. Arnold, Jr., as set out in the pleading to which this is a response.

It admits that C. C. Calhoun, as attorney for the claimant, Thomas N. Arnold, prosecuted said claim against the government, with reasonable diligence, and on the 15th day of January, 1912, the said Court of Claims allowed to the estate of Thomas N. Arnold, deceased, the sum of Five Thousand and Fifteen ($5,015.00) Dollars.

42 It admits that the findings and conclusions of the said Court of Claims was certified to Congress on January 17th, 1912, and it further avers that on March 4th, 1915, an appropriation was made for the payment of said claim; and it states that the act making said appropriation contained this provision:

"That no part of the amount of any item appropriated in this bill in excess of twenty per centum thereof shall be paid or delivered to or received by any agent or agents, attorney or attorneys on account of services rendered or advances made in connection with said claim."

It states further that it was also provided by the terms of said act as follows:

"It shall be unlawful for any agent or agents, attorney or attorneys to exact, collect, withhold or receive any sum which in the aggregate exceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum no- exceeding $1,000."

43 It states that by reason of said provisions of the act making the appropriation for the payment, among others of the claim of said Thomas N. Arnold, deceased, the contract theretofore subsisting between the firm of Calhoun and Sizer and the contract between Calhoun and Thomas N. Arnold, Jr., as administrator of Thomas N. Arnold, deceased, was abrogated and held for naught as being against the public policy of the United States.

This answering defendant states further that the total amount held by it as assets of the estate of Thomas N. Arnold, deceased, was derived from the appropriation set out in the intervening petition of C. C. Calhoun, and that this defendant has not now in its possession and never had of the assets of the estate of Thomas N. Arnold, deceased, any amount except that which was derived from the appropriation set out in the intervening petition of C. C. Calhoun.

This answering defendant states that it is expressly prohibited by section 4 of the act of Congress approved March 4, 1915, entitled "An Act making appropriation for payment of certain claims in accordance with findings of the Court of Claims, reported under

the provisions of the Acts approved March third, eighteen hundred and eighty-three, and March third, eighteen hundred and eighty-seven, and commonly known as the Bowman and Tucker Acts, and under the provisions of section numbered one hundred and fifty-one of the Act approved March third, nineteen hundred and eleven, commonly known as the Judicial Code," from paying for
44 the services rendered by said C. C. Calhoun any amount in excess of twenty per cent of the amount paid under said act for services rendered or advances made in connection with said claim.

Wherefore it specially pleads the said act of Congress, set out in the answer, counter-claim, cross-petition and intervening petition of said C. C. Calhoun, in bar of any recovery by said Calhoun upon the said contract or contracts.

And it prays to be hence dismissed with its costs.

Par. 2. For further answer to the intervening petition of C. C. Calhoun, this answering defendant, Capital Trust Company, states that it hereby reiterates all of the averments of the first paragraphs herein and thereupon states further, that after the passage of the act of March 4, 1915, the intervening petitioner, C. C. Calhoun, on June 7, 1915, addressed to the Secretary of the Treasury, a request to issue a warrant in the sum of $1,003 payable to the petitioner on account of services as attorney for the claim allowed Thomas N. Arnold, Jr., administrator of Thomas N. Arnold, deceased, and to the Capital Trust Company, successor to the said Thomas N. Arnold, deceased, as appropriated for by the Act of Congress approved March 4, 1915 (Public No. 289), as appears by exhibit filed with the cross-petition of the said C. C. Calhoun.

45 Wherefore this answering defendant says that the said C. C. Calhoun is estopped to assert any other or further claim under the contract sued on herein.

Wherefore it prays to be hence dismissed with its costs.

Par. 3. This answering defendant states that as part of this paragraph it sets out as fully as if the same were copies herein in words and figures all of the averments of paragraph 1, herein, except so much as sets out specifically the provisions of the act of March 4, 1915, and thereupon states further that the contracts set out and relied upon by the intervening petitioner in his cross-petition, are invalid in this: that they, and each of them are true in contravention of section 477 of the Revises Statutes of the United States, in that the said contracts make the payment of the compensation for services rendered thereunder, a lien upon the claim and upon any draft, money or evidence of indebtedness which may be issued upon said claim.

Wherefore it prays to be hence dismissed with its costs.

T. L. EDELEN,
Attorney Capital Trust Company, de b. n. T. N. Arnold.

46 At a court held on the 5th day of May, 1916, the following order was entered:

FANNIE P. ARNOLD, Plaintiff,

vs.

CAPITAL TRUST COMPANY, Defendant.

Order.

Came plaintiff, Fannie P. Arnold, and adopted the answer of the Capital Trust Company, Admr., herein, as her answer to the cross-petition of C. C. Calhoun and Calhoun & Sizer.

Came C. C. Calhoun and Calhoun & Sizer and filed General demurrer to answer of Capital Trust Co., Admr. and Fannie P. Arnold.

The demurrer referred to in the foregoing order is as follows:

FANNIE P. ARNOLD, Plaintiff,

vs.

CAPITAL TRUST CO., Defendant.

Demurrer to Answer.

Come the intervening petitioners, C. C. Calhoun and Calhoun & Sizer, and demur generally to the answer of the Capital Trust Company and Fannie P. Arnold and to each paragraph thereof; and for cause say that — the whole of said answer nor any paragraph thereof states facts sufficient to constitute a defense to their intervening petition.

47 Petitioners for ground of demurrer say that the provisions of said Act of Congress approved March 4, 1915, attempting to limit the amount to be paid to attorneys, in legal effect would operate to deprive petitioners of their property and property rights, as will be seen by reference to their petition herein, and to deny to petitioners the right to enforce a valid and just claim due them, and is a discrimination against the attorneys representing the claimants named in the said act and no others without any reason for the classification, depriving them of their property and liberty without due process of law, all in contravention of the terms of the Fifth Amendment of the Constitution of the United States; for which reasons petitioners allege said attempted limitation of attorneys' fees by said act to be null and void.

J. P. HOBSON & SON,
For Cross-Plaintiffs.

At a court held on the 30th day of September, 1916, the following order was entered:

FANNIE P. ARNOLD, Plaintiff,

vs.

CAPITAL TRUST COMPANY, Admr., Defendant.

Order.

By consent of parties this action is revised in the name of D. D. Smith as administrator of Fannie P. Arnold, deceased, and the action is now submitted on the demurrer of C. C. Calhoun to the answer to his petition.

48 At a court held on the 27th day of January, 1917, the following judgment was entered:

FANNIE P. ARNOLD, Plaintiff,

vs.

CAPITAL TRUST COMPANY, Admr., &c., Defendant.

Judgment.

This cause being heard on the demurrer of cross-plaintiff, C. C. Calhoun, to the answer to his cross-petition and the court being sufficiently advised it is adjudged that said demurrer be sustained to which the Capital Trust Company as administrator of Thomas N. Arnold, deceased, and D. D. Smith as administrator of Fannie Arnold, deceased, except and decline to plead further. It is therefore adjudged by the court that C. C. Calhoun recover of the Capital Trust Company as administrator of Thomas N. Arnold, deceased, the sum of fifteen hundred and four [illegible] dollars with interest from date [illegible] and [illegible] and may have execution [illegible] 13th day [illegible] and [illegible] to all which the Capital Trust Company as administrator of Thomas N. Arnold, deceased, and D. D. Smith as administrator of Fannie Arnold, deceased, excepts and prays an appeal to the Court of Appeals which is granted.

49 *Supersedeas Bond.*

THE COMMONWEALTH OF KENTUCKY,
Franklin Circuit Court:

CAPITAL TRUST CO., Adm'r T. N. Arnold, Appellant,

—,

C. C. CALHOUN, and D. D. SMITH, Adm'r, Appellee.

Upon an Appeal from a Judgment of the Franklin Circuit Court, Rendered 27th Day of January, 1917.

Whereas, Said Appellant Capital Trust Co., Adm'r T. N. Arnold, has prosecuted an appeal from the Judgment of the Franklin Circuit Court, rendered at the January Term, 1917, against it in favor of the Appellee, for the sum of $7,000.00 with interest and the appellant has desire to supersede the the said Judgment above mentioned.

Now, We Capital Trust Company, Adm'r, &c., and surety T. L. Edelen do hereby covenant to and with the Appellee that the Appellant will pay to the Appellee all costs and damages that may be adjudged against the Appellant on the appeal, and also that they will satisfy and perform the Judgment above stated, in case it shall be affirmed, and any Judgment or Order which the Court of Appeals may render, or ordered to be rendered by the inferior Court, not exceeding in amount or value the Judgment aforesaid. And also pay all rents, hire or damage, which during the pendency of the appeal, may accrue on any part of the property of which the Appellee is kept out of possession by reason of the appeal.

Witness our hands, this 19 day of March, 1917.

CAPITAL TRUST COMPANY,
Adm'r T. N. Arnold,
By T. L. EDELEN, Pres't.
T. L. EDELEN, Surety.

Attest:
KELLY C. SMITHER,
C. F. C. C.

50 Franklin Circuit Court.

FANNIE P. ARNOLD, Plaintiff,

vs.

CAPITAL TRUST COMPANY, Administrator, Defendant.

Schedule.

For the purpose of appeal in this case the clerk is hereby directed to copy the entire record herein, including exhibits, the summons, and the officer's return thereon.

THE CAPITAL TRUST COMPANY, Admr.;
By T. U. EDDLEMAN,
Attorney for Capital Trust Company.

51 Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY,
County of Franklin:

I, Kelly C. Smither, Clerk of the Franklin Circuit Court, in and for the County and State aforesaid, do hereby certify that the foregoing 51 pages contain a full, true and complete transcript of the record and proceedings in the case where Fannie P. Arnold is plaintiff, and Capital Trust Company, Admr. is defendant; No. 28425 (as per schedule), an action lately pending in the aforesaid court, as same appears of record, and now on file in my office.

Witness my hand as clerk aforesaid, this 20th day of March, 1917.

KELLY C. SMITHER,
By ——, D. C.

Transcript fee $19.05.

52 Kentucky Court of Appeals.

CAPITAL TRUST COMPANY, Administrator of T. N. Arnold, Deceased, Appellant,

vs.

C. C. CALHOUN, and D. D. SMITH, Administrator of Fannie P. Arnold, Deceased, Appellees.

Statement.

The parties to this appeal are as stated in the caption; the judgment was rendered by the Franklin Circuit Court at the January term 1917 and may be found on page 9 of the record.

Messrs. Hobson & Son of Frankfort, Kentucky, are attorneys for the appellee C. C. Calhoun, and B. G. Williams of Frankfort, Kentucky, is attorney for D. D. Smith, administrator of Fannie P. Arnold, deceased; and T. L. Edelen, of Frankfort, Kentucky is attorney for the appeliant; no summons or warning order is desired.

T. L. EDELEN,
For the Appellant.

This March 20th, 1917.

53 Be it remembered that on the 2nd, day of November 1917, there was entered in the Court of Appeals of Kentucky the following judgment to-wit:

T. N. ARNOLD'S ADMINISTRATOR, Appellant,

VS.

C. C. CALHOUN, &c., Appellees.

Appeal from Franklin Circuit.

Judgment.

The Court being sufficiently advised it seems to them there is no error in the judgment herein. It is therefore ordered that said judgment be affirmed, and that the Appellee herein recover of the Appellant 10% damages on amount of the Judgment superseded. It is further ordered that the Appellees recover of the Appellants their costs herein expended, which is ordered certified to the lower court for record.

Upon the foregoing judgment, the following opinion was rendered:

54 Kentucky Court of Appeals, November Second, 1917.

T. N. ARNOLD'S ADMR., Appellant,

VS.

C. C. CALHOUN, Appellee.

Appeal from Franklin Circuit Court.

Opinion of the Court by Judge Miller, Affirming.

On August 1st, 1905, Thos. N. Arnold of Frankfort employed the appellee C. C. Calhoun as his attorney to recover a claim which Arnold had against the United States Government for the use of certain real estate and for the value of certain stores and supplies which had been seized and used by the federal government during

the war between the states. The contract was in writing;
55 and, by its terms Arnold agreed to pay Calhoun a fee equivalent in amount to fifty per cent of whatever sum of money might be awarded or collected on account of the claim.

After suit had been filed in the United States Court of Claims and practically prepared for trial, Thos. N. Arnold died, and his administrator entered into a similar written contract with Calhoun by which he confirmed the contract which Thos. N. Arnold had made four years before. On January 15th, 1912 Calhoun obtained a judgment for Arnold's Administrator for $5015.00.

Provision was made for the payment of this claim in the appropriation Act of Congress approved March 14th, 1915; and, by the fourth clause of that act it was further provided that no part of the amount of any item appropriated therein, in excess of twenty per cent thereof, should be paid to or received by any attorney on account of services rendered in connection with the claim. Another clause of the act made it unlawful for any attorney to collect or receive exceeding twenty per cent of the amount of any item named in the act, on account of services rendered in connection with its collection, and subjected the offender to a fine not exceeding the sum of $1000.00.

56 The Secretary of the Treasury paid Calhoun twenty per cent of the Arnold claim; and as Calhoun claimed the remaining thirty per cent which was in the hands of Arnold's administrator, Arnold's widow brought this action against the administrator in the Franklin circuit court for the purpose of settling the question of the liability of Arnold's estate for the remaining thirty per cent of Calhoun's fee.

Calhoun intervened in the action and made his answer a cross-petition against Arnold's Administrator; and the circuit court having sustained Calhoun's claim and awarded him a judgment against the administrator for $1505.04, the administrator appealed.

This case runs on all fours with Black v. O'Hara's Admr. 175 Ky. 623, where it was held that the act of Congress approved March 14th, 1915, appropriating money for the payment of similar claims and containing a similar provision limiting an attorney's fee to twenty per cent of the amount recovered, was in so far as it attempted to limit the amount of a fee theretofore earned, unconstitutional and invalid.

We have been urged to recede from the rule announced in Black vs. O'Hara's Admr., supra, as being unsound in principle; but after a careful reconsideration of the reasoning by which the decision in that case is supported, we are satisfied of its soundness and reaffirm it.

Judgment affirmed.

T. L. Edelen, for appellant, Frankfort, Ky.
B. G. Williams, for appellee, Frankfort, Ky.

57 Be it remembered, that there was filed in the office of the Clerk of the Court of Appeals, Bond which is in words and figures as follows:

Kentucky Court of Appeals.

CAPITAL TRUST COMPANY, Administrator of the Estate of Thomas N. Arnold, Deceased, Appellant,

vs.

C. C. CALHOUN, Appellee.

Bond.

Know all men by these presents that we, Capital Trust Company, a corporation, as administrator of the estate of Thomas N. Arnold, deceased, as principal and S. French Hoge and W. H. Posey, as sureties, are held and firmly bound unto C. C. Calhoun, the appellee herein, in the full and just sum of Five Thousand ($5,000.00) Dollars, to be paid to the said C. C. Calhoun, his certain attorneys, personal representatives or assigns; to which payment, well and truly to be made we bind ourselves, successors, heirs and personal representatives jointly and severally by these presents. Sealed with our seals, and dated this 26th day of January, in the year of our Lord one thousand nine hundred and eighteen.

Whereas lately in the Court of Appeals of Kentucky in an appeal depending in said court, between C. C. Calhoun, cross-plaintiff, and Capital Trust Company, as administrator of the estate of T. N. Arnold deceased, defendant to cross-petition, a judgment was rendered against the said Capital Trust Company, as administrator of the estate of T. N. Arnold deceased, and it having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid action, and a citation directed to the said C. C. Calhoun, *d*iting and admonishing him to be and appear at a session of th- United States Supreme Court to be holden at the City of Washington, upon the 20th day of February 1918.

Now the condition of the above obligation is such that if
58 the said Capital Trust Company as administrator, etc. shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to make said plea good, then the above obligation to be void, else to remain in full force and virtue.

CAPITAL TRUST CO.,
By S. FRENCH HOGE, *President.*
S. FRENCH HOGE, *Surety.* [SEAL.]
W. H. POSEY. [SEAL.]

STATE OF KENTUCKY,
County of Franklin, set:

Before me, Clara Kershaw, a Notary Public in and for the County and State aforesaid, personally appeared S. French Hoge, President

of Capital Trust Company and executed the foregoing bond and Weston D. Furr, Secretary of said Company who affixed the seal of said Company in my presence, and *laso* S. French Hoge, and W. H. Posey, individually, who signed, edecuted and consented to the deliverance of said bond as sureties to same.

In testimony thereof witness my hand and seal this 26th day of January 1918. My Commission expires January 21st 1922.

CLARA KERSHAW,
Notary Public Franklin County, Kentucky.

Approved by
W. E. SETTLE,
Chief Justice Court of Appeals of Kentucky.

59 STATE OF KENTUCKY,
County of Franklin, sct:

Came S. French Hoge and W. H. Posey, who made oath that they and each of them owns in Franklin County, Kentucky, real estate of the actual cash value of more than Five Thousand ($5,000.-00) Dollars, each.

S. FRENCH HOGE.
W. H. POSEY.

Subscribed and sworn to before me this 26th day of January 1918, by S. French Hoge and W. H. Posey.
My commission expires January 21st, 1922.

CLARA KERSHAW,
Notary public Franklin County, Kentucky.

Endorsed and filed Jan. 26, 1918. R. W. Keenon, C. C. A.

60 Be it remembered, that there was filed in the office of the Clerk of Court of Appeals, præpice in words and figures as follows:

Kentucky Court of Appeals.

CAPITAL TRUST COMPANY, Administrator of the Estate of Thomas Arnold, Deceased, Appellant,

vs.

C. C. CALHOUN, Appellee.

præcipe.

To Rodman W. Keenon, Clerk:

You will please copy as your return to writ of error issued herein in behalf of Captiol Trust Company, the entire record of this case

as same appears on file in your office, together with the opinion of the court and mandate.

T. L. EDELEN,
Att'n'y for C. T. Co.

Indorsed. Filed January 26, 1918. R. W. Keenon, C. C. A.

61 Court of Appeals of the State of Kentucky.

I, Rodman W. Keenon, Clerk of the Court of Appeals for the State of Kentucky, certify that the foregoing is a true and correct copy of the record called for in the præcipe filed in the case of Capital Trust Company, Administrator of Thomas N. Arnold, Appellant, now plaintiff in error vs. C. C. Calhoun et al, now defendants in error for the use upon appeal from the judgment of the Court of Appeals of Kentucky to the Supreme Court of the United States.

In testimony whereof, witness my hand in- seal of this Office at Frankfort, Kentucky, this January 9, 1918.

[Seal Court of Appeals of Kentucky.]

RODMAN W. KEENON,
Clerk Court of Appeals of Kentucky.

Fee $21.40.

62 Kentucky Court of Appeals.

CAPITAL TRUST COMPANY, as Administrator of the Estate of Thomas N. Arnold, Deceased, Appellant,

vs.

C. C. CALHOUN, Appellee.

Petition for Writ of Error.

* * * * * * *

To the Honorable Warner E. Settle, Chief Justice of the Commonwealth of Kentucky, and the other judges of said court:

The petition of Capital Trust Company, administrator of the estate of Thomas N. Arnold, deceased, respectfully shows:

That heretofore, on the 20th day of March, 1916, one Fannie P. Arnold instituted an action in equity in the Franklin Circuit Court, Kentucky, against your petitioner as administrator of the estate of Thomas N. Arnold, deceased, for a settlement of the affairs and accounts of said estate.

In said action the appellee, C. C. Calhoun, filed an intervening petition which was made a cross-petition against your petitioner in which he sought to recover a claim against your petitioner as administrator arising as follows:

The said C. C. Calhoun asserted that he had prosecuted against

Inited States a claim for Thomas N. Arnold upon an agree- between himself and said Arnold that he should receive for rvices a fee of 50% of the amount which he might recover said claim against the said government. The said petition d that he did in fact recover of the United States the sum of , of which amount $1003.00 was paid him upon his fee, g $1504.50 unpaid.

Your petitioner as administrator of Thomas N. Arnold, filed an answer to the cross-petition of the said Calhoun in which he set up and claimed that the act making the appro- on for the payment of the claim against Thomas N. Arnold t the United States contained the express provision that no ey should receive, accept or claim any amount in excess of of the amount received or collected by him; that your peti- as administrator of the said Thomas N. Arnold, had never ed any assets of the estate, except the amount paid by the l States upon the claim herein set out. It thereupon asserted t had no right and that it was not its duty to pay to the alhoun any amount in excess of 20% which it had already pon the said claim; that this claim of the administrator was under the act of Congress making the appropriation for the nt of Calhoun's debt and not otherwise. The Franklin Cir- ourt held that the answer of your petitioner to the cross- n of the said Calhoun was insufficient and thereupon rendered gment for $1504.50, with interest from July 1st, 1915, and sts herein, it being 50% of the amount recovered by Thomas nold through the said Calhoun from the United States Gov- nt, less 20% which the said Calhoun admitted had theretofore aid.

reupon your petitioner as administrator prosecuted an appeal Court of Appeals of the State of Kentucky, which is the t court of law or equity which could pass upon the validity said claim and thereupon upon the 2nd day of November, the Court of Appeals of Kentucky affirmed the judgment of rt below. Your petitioner states that the Court of Appeals of cky committed against it as administrator aforesaid divers ndry errors in rendering said judgment, all of which will fully appear by its assignment of errors, which is filed here- nd which it begs leave to refer for greater certainty.

erefore your petitioner prays that a writ of error may be issued and that it may be allowed to take up for review before the Supreme Court of the United States the orders and judg- ment of the Court of Appeals of Kentucky herein set out at your petitioner may have such other and further relief premises as may be just and your petitioner will ever pray.

T. L. EDELEN,
For the Appellant.

STATE OF KENTUCKY,
County of Franklin, sct:

Upon consideration of the foregoing petition it is now ordered that a writ of error upon same be allowed directed to the Court of Appeals of Kentucky at Frankfort upon the execution of a bond by plaintiff in error according to law, in the sum of $2500, said bond to operate as a supersedeas. This January 26, 1918.

W. E. SETTLE,
Chief Justice of the Court of Appeals of Kentucky.

[Endorsed:] Filed Jan. 26, 1918. R. W. Keenon, C. C. A.

65 In the Court of Appeals of Kentucky.

CAPITAL TRUST COMPANY, Administrator of the Estate of Thomas N. Arnold, Deceased, Appellant,

vs.

C. C. CALHOUN, Appellee.

Assignment of Errors.

Comes now Capital Trust Company, administrator of the estate of Thomas N. Arnold, deceased, and makes and files this its assignment of errors herein:

1. That the Court of Appeals erred in affirming the judgment of the Franklin Circuit Court in holding that its defense to the cross-petition of C. C. Calhoun was not good and in sustaining a demurrer to same.

2. The Court of Appeals erred in holding that the said C. C. Calhoun was entitled to recover 50% of the amount recovered by Thomas N. Arnold against the United States, notwithstanding the fact that the act authorizing said claim expressly provided that no amount in excess of 20% should be received by any attorney for prosecuting such claim.

3. The court erred, to the manifest prejudice of the Capital Trust Company, administrator, etc., in holding the act of Congress making the appropriation to Thomas N. Arnold and others invalid in providing that no amount in excess of 20% should be received by any attorney for prosecuting any claim for which an appropriation was made by said act, although such attorney may have had a contract for an amount in excess of such 20%.

4. The court erred in affirming the judgment of the Franklin Circuit Court in rendering judgment against the appellant
66 for the amount claimed in the cross-petition and for costs of said action.

T. L. EDELEN,
Attorney for Appellant.

Filed January 26th, 1918. W. E. Settle, Chief Justice, Kentucky Court of Appeals.

[Endorsed:] Filed Jan. 26, 1918. R. W. Keenon, C. C. A.

67 THE UNITED STATES OF AMERICA:

The President of the United States to the Honorable Judges of the Court of Appeals of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said court before you or some of you between C. C. Calhoun and Capital Trust Company, as administrator of the effects of T. N. Arnold, deceased, a manifest error hath happened, to the great damage of the said Capital Trust Company, administrator, etc., as by its complaint appears, we being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at Washington, together with this writ, so that you have the same before said court on the 20th day of February, 1918, in said court to be then and there held, that the record and proceedings aforesaid being inspected, the said court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court, the 26th day of January, in the year of our Lord one thousand nine hundred and eighteen.

[Seal United States of America, Eastern Kty. Dist. Court.]

J. W. MENZIES,
Clerk of the U. S. District Court for the Eastern District of Kentucky.

By CHAS. N. WIARD,
Deputy Clerk.

Allowed January 26, 1918.
W. E. SETTLE,
Chief Justice Court of Appeals of Kentucky.

68 Kentucky Court of Appeals.

To C. C. Calhoun, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be held in the City of Washington on the 20th day of February 1918, pursuant to

a writ of error filed in the clerk's office in the Court of Appeals of Kentucky, wherein Capital Trust Company, administrator of Thomas N. Arnold, deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 26th day of January, in the year of our Lord, one thousand nine hundred and eighteen.

W. E. SETTLE,
Chief Justice Court of Appeals of Kentucky.

I hereby this 26 day of January 1918 accept due personal service of this citation on behalf of C. C. Calhoun, defendant in error.

J. P. HOBSON & SON,
Solicitors for Defendant in Error.

[Endorsed:] Filed Jan. 28, 1918. R. W. Keenon, C. C. A.

69 Kentucky Court of Appeals.

CAPITAL TRUST COMPANY, Administrator of the Estate of Thomas N. Arnold, Deceased, Appellant,

vs.

C. C. CALHOUN, Appellee.

Præcipe.

To Rodman W. Keenon, Clerk:

You will please copy as your return to writ of error issued herein in behalf of Capital Trust Company, the entire record of this case as same appears on file in your office, together with the opinion of the court and mandate.

T. L. EDELEN,
Att'y for C. Tr. Co.

[Endorsed:] Filed Jan. 26, 1918. R. W. Keenon, C. C. A.

70 To the Honorable Supreme Court of the United States:

CAPITAL TRUST COMPANY, Administrator of Thomas N. Arnold, Deceased, Plaintiff in Error,

vs.

C. C. CALHOUN, Defendant in Error.

Prayer for Reversal.

Comes Capital Trust Company, as a corporation as administrator of the estate of Thomas N. Arnold, by T. L. Edelen, its attorney, and prays for a reversal of the judgment of the Kentucky Court of Appeals, which judgment was rendered on the 2nd day of November A. D. 1917, and for such relief as may be proper therein.

CAPITAL TRUST COMPANY,
As Admr. of T. N. Arnold,
By T. L. EDELEN,
Attorney.

Endorsed on cover: File No. 26,345. Kentucky Court of Appeals. Term. No. 878. Capital Trust Company, administrator of the estate of Thomas N. Arnold, deceased, plaintiff in error, vs. C. C. Calhoun. Filed February 20th, 1918. File No. 26,345.

-31-

No. 368

Office Supreme Court, U.
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JAMES D. MAHER,
CLERK

SUPREME COURT OF THE UNITED STATES

CAPITAL TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF THOMAS N. ARNOLD, PLAINTIFF IN ERROR,

VERSUS

C. C. CALHOUN, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

T. L. EDELEN,
For Plaintiff in Error.

WESTERFIELD-BOOTH CO., INCORPORATED, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

CAPITAL TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF THOMAS N. ARNOLD, DECEASED, - - *Plaintiff in Error.*

versus

C. C. CALHOUN, - - - - *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

May it please Your Honors:

This action was instituted in the Franklin Circuit Court at Frankfort, Ky., by Fannie P. Arnold against Capital Trust Company, administrator *de bonis non* of Thomas N. Arnold, deceased, for the settlement of the estate of said Thomas N. Arnold. The petition may be found in the printed transcript at page 1. The case was referred to the Master Commissioner of the Franklin Circuit Court to receive and audit claims against Arnold's estate [printed transcript, page 3]. Thereupon C. C. Calhoun, as assignee of Calhoun and Sizer, intervened and filed an answer which was made a cross-petition against Capital Trust Company, administrator, as aforesaid.

This intervening petition may be found beginning on page 13 of the printed transcript.

The gravamen of the cross-plaintiff's action against Arnold's administrator is a contract with the cross-plaintiff, defendant in error, or rather with the firm of Calhoun and Sizer, which contract was assigned to the defendant in error, by which Thomas N. Arnold, the decedent, agreed to pay that firm a fee of 50% of any amount which might be collected upon a claim which Thomas Arnold had against the government known as a "war claim" or a claim arising from property seized by the government for its use during the Civil War. After the Capital Trust Company had filed a demurrer to the intervening petition of the cross-plaintiff, Calhoun, which was overruled, it filed an answer, which may be found in the printed transcript beginning at page 19. This answer raised the question that under the act of Congress making appropriation for the payment of Thomas N. Arnold's claim, which had been adjudicated and allowed by the Court of Claims, by the express terms of that act it was provided:

> "That no part of the amount of any item appropriated in this bill in excess of twenty per centum thereof shall be paid or delivered to or received by any agent or agents, attorney or attorneys on account of services rendered or advances made in connection with said claim.
>
> "It shall be unlawful for any agent or agents, attorney or attorneys to exact, collect, withhold or receive any sum which in the aggregate ex-

ceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding $1,000."

This act is quoted in the cross-petition of Calhoun and may be found on page 15 of the printed transcript. It is further alleged in the answer of the Capital Trust Company [printed transcript, page 20]:

"This answering defendant states further that the total amount held by it as assets of the estate of Thomas N. Arnold, deceased, was derived from the appropriation set out in the intervening petition of C. C. Calhoun, and that this defendant has not now in its possession and never had of the assets of the estate of Thomas N. Arnold deceased, any amount except that which was derived from the appropriation set out in the intervening petition of C. C. Calhoun."

It further appears from the exhibit that the intervening petition of C. C. Calhoun [printed transcript, page 17] that on the 7th of June, 1915, he filed with the Secretary of the Treasury of the United States a demand in this language:

"Washington, D. C., June 7, 1915.

"I hereby request the Secretary of the Treasury of the United States to issue a warrant in the sum of one thousand and three dollars ($1,003.00), payable to me on account of services as

attorney in the claim of Capital Trust Company of Frankfort, Kentucky, successor to Thomas N. Arnold, Jr., administrator of Thomas N. Arnold, deceased, late of Kenton County, Kentucky, against the United States, as appropriated for by the Act of Congress approved March 4, 1915 (Public No. 289), the receipt of said warrant by me to be taken and accepted as a full and final release and discharge of any claim I may have against the United States on account of services as attorney in said claim.

C. C. Calhoun."

The Franklin Circuit Court sustained the demurrer of Calhoun to the answer of Arnold's administrator to his cross-petition and defendant declining to plead further, judgment was rendered against it for 50% of Arnold's judgment in the Court of Claims crediting him by the 20% which had been paid him. The Capital Trust Company, as administrator of Arnold, appealed to the Court of Appeals of Kentucky from this judgment and on the second of November, 1917 that court affirmed the judgment of the Franklin Circuit Court. Within three months the administrator of Arnold prosecuted a writ of error to this court upon the ground that it had asserted a Federal question and its right thereunder had been denied by the Kentucky Court. The judgment obtained by Arnold in the Court of Claims was $5,015; the amount which Calhoun would be entitled to at 50% would be $2,507.50, of this amount he was paid 20%, amounting to $1003, leaving a balance claimed by him of $1,504.50. The amount is small in

this individual case but in the numerous cases arising under the war claims the amount would be very large indeed.

ARGUMENT.

The cardinal questions in this case, therefore, are, as I conceive, (1) was Calhoun's contract a valid one; and (2) if this question shall be answered in the affirmative, was it competent for Congress to limit the amount which he might recover to make it lawful for him to demand any sum in excess of 20%; and a third question directly connected with these is: did he not acquiesce in the validity of the statute by his order (which I have quoted) upon the Secretary of the Treasury?

The errors complained of as shown by the assignment of errors [page 32 of the printed transcript] are as follows:

(1) That the Court of Appeals erred in affirming the judgment of the Franklin Circuit Court in holding that the defense of the plaintiff in error to the cross-petition of C. C. Calhoun was not good and in sustaining the demurrer to same.

(2) The Court of Appeals erred in holding that Calhoun was entitled to recover 50% of the amount of the claim, in the face of the act of Congress limiting him to 20%.

(3) The court erred to the prejudice of the plaintiff in error in holding that the act of Congress making the appropriation to Thomas N. Arnold and

others, was invalid in providing that no amount in excess of 20% should be received by any attorney for prosecuting any claim under the act.

(4) The court erred in affirming the judgment of the Franklin Circuit Court in rendering judgment against the plaintiff in error for the amount claimed in Calhoun's cross-petition.

And these assignments may be conveniently discussed under two general heads: (1) was Calhoun's original contract a valid one; and (2) if it was originally valid, was it competent for Congress in making the appropriation to limit Calhoun to an amount less than that provided for in his contract.

1. Was Calhoun's contract a valid one?

I think this question must be answered in the negative. By a statute enacted by Congress on the 29th of July, 1846, and re-enacted on the 26th of February, 1853 [Section 3477 of the Revised Statutes; U. S. Compiled Statutes, 1901, page 2320; Federal Statutes Annotated Vol. 2, page 7], which was in force when Calhoun's contract was made, it was expressly provided as follows:

> "All transfers and assignments, made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the pres-

ence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgements of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgement, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

In Calvin R. Nutt v. S. Prentice Knut, 200 U. S. 12, it was distinctly held that so much of the contract which made the payment of compensation for services a lien upon the claim and upon any draft, money or evidence of indebtedness, which might be issued thereon, was repugnant to this statute. The act under consideration in that case, however, did not limit the amount which an attorney for a claimant might charge as against his client. The attorney in that case made a contract with a claimant for the prosecution of the claim against the United States for 33 1/3% with a lien upon the claim to secure the payment of his one-third. The plaintiff brought an action against his client for the recovery of 33 1/3% of the amount collected from the government. He subsequently amended his petition and asked that in the event of his not being entitled to compensation under the original contract, he have judgment for such sum as his services were reasonably worth,

which were alleged to be $30,000. Upon the final submission of the case in the court of original jurisdiction, the chancellor rendered a judgment that the original contract violated the statute of the United States, which I have quoted, and further that the plaintiff procured personal solicitation to be made of the members of Congress in behalf of his said claim, which were found by the chancellor to be against public policy. His bill was, therefore, dismissed at his costs. Upon appeal the judgment was reversed by the Supreme Court of Mississippi which held that the plaintiff was entitled to recover upon his contract. The claimant therepon recovered judgment upon this contract and on appeal to the Supreme Court of Mississippi, the judgment was affirmed. A writ of error was thereupon prosecuted to this honorable court, and the judgment was affirmed, this court holding (1) that an attorney's contract with a claimant was void under §3477 of the Revised Statutes, which I have quoted, but that the plaintiff was entitled to recover upon a *quantum meruit* and that his recovery was within his amended petition. This case is, therefore, authority for two propositions: (1) a contract with a claimant against the United States government for a specific percentage of the claim with a lien upon the claim is a violation of Section 3477 of the Revised Statutes; and (2) that in the absence of any restriction upon the amount of the plaintiff's recovery by the statute making the allowance he may recover upon appropriate pleading

upon a *quantum meruit*. The general act, however, making appropriation for the Civil War Claims contained the provision herein quoted, making it a penal offense for the attorney, agent or agents to accept for services any amount in excess of 20%.

> "It shall be unlawful for any * * * attorney * * * to exact, collect, withhold or receive any sum which in the aggregate exceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding."

In the case of McGowan v. Parrish, 237 U. S. 285, your Honors had under consideration the effect of Section 3477 of the Revised Statutes of the United States upon a contract for the recovery of a specific percentage of a claim with a lien on the claim for its enforcement. The same conclusion was reached by the court as in Nutt v. Knut, with a single exception that your Honors held in this later case that no specific recovery need be demanded upon a *quantum meruit* where the action was in equity and the bill prayed for all proper relief.

In that case as in the Nutt v. Knut case, there was no provision in the act making an appropriation limiting the amount which an attorney might contract for, for the prosecution of these claims. There was nothing, therefore, in the McGowan-Parrish case which precluded counsel from recovering upon a *quantum meruit*. If the appropriation, however, for

the payment of the "ice claim" had expressly provided that counsel could not recover in excess of 20%, I apprehend no contract could have been implied that he might recover the value of his services to the extent of 50%. No *quantum meruit* can be set up in the face of an express statute.

Now it is quite apparent that Calhoun, the defendant in error, must recover of the Capital Trust Company as administrator under the contract set out or not at all. The contract itself which is within the language of the contract in the case under consideration, was in that case held to be null and void. Could Calhoun recover upon a *quantum meruit?* I submit the answer must be in the negative; if he had sought such a recovery it would necessarily have been denied him because no contract for his services could be implied in the face of the express prohibition of the act making the appropriation. A reading of Calhoun's intervening petition will demonstrate to your Honors that the plaintiff himself relied upon his contract and upon the fact that Congress had no right to impair it. The plaintiff's intervening petition nowhere alleges that Calhoun, or the firm of which he was a member at the time the contract was made, rendered Arnold or his estate services which were reasonably worth 50% of his claim against the government.

I have stated that the act under consideration in the case of Nutt v. Knut contained no limitation upon the amount which the attorney might contract with

his client to recover. In support of this assertion I quote from the intervening petition:

> "That although millions of dollars have heretofore been appropriated to pay allowances made by the Court of Claims in similar claims Congress has never attempted in any of said previous Appropriations Acts to regulate the fees of attorneys and has never heretofore questioned the validity of contracts fixing the attorneys fees in such cases." [Page 16, printed transcript.]

And so in the case of Nutt v. Knut, there was no obstacle in the way of plaintiff's recovery upon a *quantum meruit* upon the allegations of his amended bill of complaint. The answer of the plaintiff in error to the intervening petition of the defendant in error expressly alleges that it has in its hands no assets belonging to the estate of Thomas N. Arnold, deceased, except the sum derived by it from the appropriation under consideration. It must, therefore, be conceded, I take it, that the defendant in error must claim against the appropriation itself, no other assets existing, and I most respectfully submit that he stands in this court asserting a right, which it is expressly declared by the act in question to be illegal for him to assert and for the plaintiff in error to pay.

In the case of Marshall v. Baltimore & Ohio R. R. Co., 16 How. 314, Justice Grier speaking for this court of the Act of 1853, said:

> "This act annuls all champertous contracts with agents of private claims."

In the case of Ball v. Halsell, etc., 161 U. S. 72, this court distinctly held that:

> "A contract to give an attorney one-half of all money which may be received by him for prosecuting a claim against the government on account of Indian depredations, acting under which the attorney had procured a recommendation from the Interior Department for payment, but no appropriations previous to the Indian depredation act of March 3, 1891, does not entitle him, on obtaining judgment in the court of claims under that act, to any compensation for his services except the allowance which the court may make to him in rendering the judgment, since that act expressly declares such contracts void.
>
> "A restriction of the compensation of attorneys on collection of claims against the United States is one of the terms and conditions which the United States may impose upon its consent to be sued."

In Frisbie v. United States, 157 U. S. 160, this court speaking through Judge Brewer, said:

> "Congress being at liberty to give or withhold pensions, may prescribe who shall receive and determine all the circumstances and conditions under which any application thereto shall be prosecuted. No man has a legal right to a pension and no man has a legal right to interfere in the matter of obtaining a pension for himself and others. The whole control of the matter is within the domain of congressional power. U. S. v. Hall, 98 U. S. 343. Having power to legislate on this whole matter, to prescribe the conditions under which parties may assist in procuring pensions, it has the equal power to enforce by penal provisions compliance with its require-

ment. There can be no reasonable question of the constitutionality of this statute."

I confess myself unable to follow the distinction made by counsel in the court below between a property claim against the government and a pension claim. If one claim is more sacred than another, I submit that that which arises from losing one's life or blood or limbs in support of the government would stand on a higher claim than a mere property claim, but I most respectfully urge upon your Honors that the Ball-Halsell case in principle does not differ from the case at bar, because the liability of the government for using private property for war purposes is exactly the same in principle as using private property and injuring it through the hands of its wards, the Indians.

The Constitution of the United States contains no inhibition against the impairment of the obligation of a contract by Congressional action. Section 10 of Article 1, Subsection 1, is a limitation upon the power of the States alone, to pass laws impairing the obligation of contracts and that inhibition is coupled with one against the passage of *ex post facto* laws, and the failure to contain a provision against the impairment of contracts by Congress is further emphasized by the fact that Subsection 3 of Section 9 of the same article provides that Congress shall not pass any *ex post facto* laws or bills of attainder. It has been repeatedly held that there is no limitation in the con-

stitution upon congressional action, because such action impairs the obligation of a contract.

In Mitchell v. Clark, 110 U. S. 633, this was expressly held. In the legal tender cases, 12 Wall. 457, it was held that contracts must be understood as made in reference to the possible exercise of the rightful authority of government and that no obligation of a contract could stand in the way of the exercise of a legitimate governmental legislative authority. This case distinctly held that the acts known as the legal tender acts were constitutional when applied to contracts made before their passage. Of course, the ground upon which these legal tender cases were subsequently overruled did not impair their authority upon this question.

In Canada Southern R. R. Co. v. Gebhard, 109 U. S. 527, it was held that in the absence of a provision inhibiting Congress from passing laws impairing the obligation of contracts the contracts themselves were subject to congressional control.

In New Orleans Water Works v. Louisiana, 185 U. S. 336, it was held that the contract clause of the United States Constitution, had reference only to State legislation or to an enactment of a legislative character by a municipal corporation made subsequent to a contract and which impaired its obligation.

In Louisville & Nashville R. R. Co. v. Mottley, and others, 219 U. S. 467—55 L. Ed. 297, the Supreme Court held that an agreement by an interstate carrier to issue annual passes for life in consideration of

the release of a claim for damages, though entered into prior to the act of June 29, 1906, was made enforcible by the prohibition of Section 6 of that act against demanding, collecting or receiving a greater or less or different compensation for the transportation of persons or property or for any service in connection therewith, than that specified in the carrier's published schedule of rates. That case was twice before the Supreme Court and was very maturely considered and the opinion rendered was unanimous opinion of the court.

In this case, the court by Justice Harlan said:

> "These principles [that one contracts subject to the power of Congress to legislate] control the decision of the present question. The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforcible, or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable. The framers of the Constitution never intended any such state of things to exist."

If individuals by the exercise of their contract right could divest Congress of any of its legislative power, it is conceivable that it might divest Congress of all its legislative power. Individuals, pending debate upon a legislative matter, might see fit to

execute the contract which would exempt them from the operation of the anticipated law, and so take from Congress the power to regulate matters legitimately within its sphere.

These considerations are urged upon your Honors, even upon the assumption which I have claimed to be incorrect, that Calhoun's original contract was a valid one.

The State courts of last resort in construing the act under consideration have differed as to its validity. Without discussing or attempting to answer the arguments of those courts which have reached the conclusion that this act did not limit the amount of attorneys' fee which might be recovered by one who prosecutes a claim against the government, I submit that they are necessarily answered by the elementary principles and by the rulings of your Honors herein referred to.

In Rawlston and others v. Dunaway and others, decided March 6, 1916, the Supreme Court of Arkansas, held the provision of the act of Congress limiting the amount not unconstitutional.

In Moyers v. City of Memphis, 186 S. W. 105, the chancery court for Shelby County, Tenn., held the contrary. This case as appears, stopped with the chancery court.

In Volume XLIII, Washington Law Reporter, page 691, the Supreme Court of the District of Columbia upheld the contract as against the act of Congress.

Where, therefore, there is no limitation upon the amount of recovery by the act making the appropriation, a contract may be implied to pay counsel such sum as his services may be reasonably worth. Where, however, there is a limitation in the act making the appropriation, counsel will be bound by that limitation.

I most respectfully submit that the fallacy and reasoning of those courts which sustained the contract as against the act of Congress, lies in overlooking the fact that your Honors had several times held that contracts of the exact import as Calhoun's, were a violation of Section 3477 of the Revised Statutes and were, therefore, void *ab initio*.

I most respectfully submit:

1. That Calhoun's contract is invalid under your Honors' ruling in the Ball-Halsell case, Nutt v. Knut and McGowan-Parrish cases, and in the cases discussed in those opinions.

2. That no contract for a contingent fee could be made which would so far tie the hands of Congress as to prevent it from regulating all matters vitally concerned with the appropriation made for the payment of claims against the government.

3. That Calhoun's right under his contract was not a vested right, but contingent only, and the existence or non-existence of the contingency, lay within the wisdom of Congress.

4. That Congress in making the appropriation for the payment of these Civil War claims has de-

nounced it as a misdemeanor for the attorney representing a claimant to receive more than 20% of the amount paid under the act making the appropriation, and it is likewise a misdemeanor against the plaintiff in error to pay out of the funds in his hands, any amount in excess of 20%.

I, therefore, submit that the judgment of the Court of Appeals of Kentucky was erroneous when it denied to the plaintiff in error a right asserted under the act of Congress making the appropriation and the judgment should, therefore, be reversed.

Respectfully submitted,

T. L. EDELEN,

For Plaintiff in Error.

APR 30 1919
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 368.

CAPITAL TRUST COMPANY, Administrator of the Estate of THOMAS N. ARNOLD, Deceased, *Plaintiff in Error,*

v.

C. C. CALHOUN, *Defendant in Error.*

BRIEF IN BEHALF OF C. C. CALHOUN, DEFENDANT IN ERROR.

JOSEPH W. BAILEY,
CHARLES F. CONSAUL,
Attorneys for C. C. Calhoun, Defendant in Error.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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CAPITAL TRUST COMPANY, Administrator of the Estate of THOMAS N. ARNOLD, Deceased, *Plaintiff in Error,*

v.

C. C. CALHOUN, *Defendant in Error.*

BRIEF IN BEHALF OF C. C. CALHOUN, DEFENDANT IN ERROR.

STATEMENT OF CASE.

This case is before this Court on error to the Court of Appeals of Kentucky. That court affirmed the Circuit Court of Franklin County, Kentucky, by which it was decreed that the Capital Trust Company, as administrator of the estate of Thomas N. Arnold, deceased, was indebted to C. C. Calhoun in the sum of $1,504.50, as alleged by him in his cross-petition.

The prosecution and collection of a civil war claim

gives rise to this litigation, the claim prosecuted having been one against the United States for that just compensation for the taking of private property for public use, guaranteed by the Fifth Amendment to the Constitution.

Briefly stated, the material facts are as follows:

During the Civil War the United States military forces, under proper authority, used and occupied certain real estate belonging to Thomas N. Arnold, and also appropriated to army use his personal property, such as horses, cattle, fodder, etc.

During his lifetime, Arnold employed the firm of Calhoun and Sizer as his attorneys, to prosecute his said claim, and agreed in writing to pay them as an attorney fee, a sum equal to 50 per cent of collection (Rec., p. 10). That was in 1905.

Thereafter Calhoun and Sizer entered upon the prosecution of the Arnold claim, and in 1908, a bill for payment of the claim was referred by Senate resolution to the Court of Claims.

About that time, or very shortly thereafter, Arnold, the claimant died, and Thomas N. Arnold, Jr., was appointed administrator of his estate. Also about that time, the firm of Calhoun and Sizer was dissolved, Calhoun being the continuing partner as to this case. Accordingly, in 1909, the administrator entered into a further contract with Calhoun, to continue the prosecution of said claim, upon the same terms as set forth in the original fee contract, *i. e.*, for a purely contingent fee of a sum equal to 50 per cent of collection (p. 11, Record).

Calhoun further prosecuted the claim in the Court

of Claims, taking depositions in various parts of the United States, and brought the case to trial in that court.

On January 15, 1912, the Court of Claims made various findings of fact, in the nature of an allowance or award, to the general effect that the decedent, Thomas N. Arnold, had remained loyal to the United States Government during the Civil War, and that his real estate had been used and occupied, and his personal property taken and used, by United States military forces, under proper authority, all of the reasonable value of $5,015, for which no payment appeared to have been made.

Accompanying said findings of fact were conclusions, prescribed by Act of June 25, 1910, 36 Stats., 837, reading as follows:

CONCLUSIONS.

> Upon the foregoing findings of fact the court concludes that the claim herein is an equitable one in the sense that the United States received the benefit of the supplies and the use of the property for which claim is made.
> (Record, pp. 6-7.)

Said findings and conclusion were later certified to Congress by the Clerk of Court of Claims, and an item of appropriation for payment of the claim, in accordance with said findings, was included in the Omnibus War Claims Act of March 4, 1915 (38 Stats., 962-968).

Incorporated in said appropriation act as a Senate floor amendment, was a section reading as follows:

With this brief statement of the case we will present our discussion under the following heads:

1. History of Civil War Claims.
2. The fee contract sued upon is valid and not opposed to public policy.
3. The judgment of the Kentucky Court of Appeals, holding Sec. 4 of the Act of March 4, 1915 (38 Stat. 962-996) to be unconstitutional, must be affirmed, because said section in terms limits counsel fees for services theretofore rendered, in certain enumerated cases covered by said act, regardless of prior valid contracts fixing such fees, and declares that counsel who collect or accept fees in excess of 20 per cent of any sum collected shall be guilty of a misdemeanor, punishable by a fine of $1,000, said enactment being unconstitutional in that:
   (A) It deprives defendant in error of his property without due process of law.
   (B) It deprives defendant in error of his liberty without due process of law.
4. Prior decisions on statute involved.
5. APPENDIX:
   Civil War Claims are not gratuities.
   Various cases distinguished from instant case.

HISTORY OF CIVIL WAR CLAIMS.

By act of March 3, 1863 (12 Stat., 765), the Court of Claims was given jurisdiction to render judgment in claims founded on any law of Congress, regulation of an executive department, or upon any contract, express or implied, this act amending the prior act of February 24, 1855 (10 Stat., 612).

Under said act of 1863, the Court of Claims had

jurisdiction of a claim arising from the appropriation of property during the Civil War. (See Grant vs. U. S., 1 Ct. Cl., 41.)

By act of July 4, 1864 (13 Stat., 381), however, the Court of Claims was deprived of jurisdiction of *any* claims arising from the Civil War, the prohibition applying even to pending cases. (Corbet v. U. S., 1 Ct. Cl., 139.)

That same act, however, gave jurisdiction to the Quartermaster General and Commissary General to entertain such claims of loyal citizens, arising in States not in insurrection.

The act of March 3, 1871 (16 Stat., 524), established what is commonly known as the Southern Claims Commission, with authority to consider the war claims of all loyal citizens arising in insurrectionary States, but with a number of qualifications, such as providing that no claims for rent could be considered by that commission.

The proceedings before that commission were not at all in accord with ordinary legal principles applied in judicial tribunals. Reports were made each year to Congress by the commission, and the claims allowed by it were regularly paid by appropriations made by Congress.

That commission went out of existence in 1880. There was such general complaint by persons whose claims had been rejected by it, or by those whose claims did not come within the jurisdiction of the commission, that Congress enacted what is commonly termed the Bowman Act (Act of March 3, 1883, 22 Stat., 485), providing that any committee of Con-

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That commission went out of existence in 1880. There was such general complaint by persons whose claims had been rejected by it, or by those whose claims did not come within the jurisdiction of the commission, that Congress enacted what is commonly termed the Bowman Act (Act of March 3, 1883, 22 Stat., 485), providing that any committee of Con-

gress might refer to the Court of Claims any claim not barred by any law of Congress, and containing various restrictive provisions which made the jurisdiction very narrow. The Court of Claims was directed by that act to find the facts of the claim, the loyalty of the claimant to be determined by a preliminary inquiry as jurisdictional to finding the facts on the merits of the claim, the facts to be reported by the court to the House by which the claim was transmitted to the court.

This jurisdiction to find and report the facts pertaining to claims was materially enlarged by what is generally known as the Tucker Act (Act of March 3, 1887, 24 Stat., 505), Section 14, providing for the reference by resolution of the House of Congress in which a bill might be pending, of any bill providing for the payment of a claim (other than a pension), or for any gift, grant or bounty.

By Act of June 25, 1910 (36 Stat., 837), Section 14 of the Tucker Act was amended so as to require the Court of Claims, in cases referred under that act, to report the facts,

> "together with such conclusions as shall be sufficient to inform Congress of the nature and character of the demand, either as a claim, legal or equitable, or as a gratuity, against the United States."

After enactment of the Bowman and Tucker Acts, many Civil War claims were tried by the Court of Claims, and the findings therein were certified to Congress and were made the basis of appropriations

from time to time, by the following Omnibus Claims Acts:

Act March 3, 1891 (26 Stat., 1445).
Act March 3, 1899 (30 Stat., 1161).
Act May 27, 1902 (32 Stat., 207).
Act February 24, 1905 (33 Stat., 743).

The above is taken from page 2 of House Report No. 97, 63d Congress, 2d Session, on the War Claims Bill which became the Act of March 4, 1915. It is here to be noted, that in none of all said general claims bills, was there any provision limiting or even referring to the matter of counsel fees, for services rendered in the Court of Claims.

All the claims covered by the Act of March 4, 1915, had been tried by the Court of Claims under the Bowman Act, Tucker Act or Section 151 of the Judicial Code.

All of these Claims Appropriation Acts designated by items the precise sum to be paid to each claimant, *"in accordance with findings of the Court of Claims."*

The House report above mentioned (pages 4-8) gives in general terms the proceedings before the Court of Claims in the consideration of such claims.

As set forth in the War Claims Committee's report mentioned, the claim must be stated in detail in a formal verified petition filed in the Court of Claims; depositions of the witnesses are taken as in chancery practice, counsel for claimants and for the United States being present. Counsel for the Government also usually make independent investigation in the field, with a view to discovering any facts adverse to

the claimant. In some cases witnesses are called in behalf of the Government.

After the testimony has been taken, briefs are filed by counsel on each side, and many cases argued orally before the court. Every case is actively defended by counsel representing the United States, under direction of an Assistant Attorney General.

As stated by the Committee on War Claims of the House of Representatives in said report on this very act:

> The findings of fact made by the Court of Claims, and which have been considered in connection with every claim included in this bill, represent the result reached by the court after the trial of each case. The standing expression used by the Court of Claims introductory of its findings of fact is as follows:
>
> "————————appeared for the claimant, and the Attorney General, by Mr. ————, his assistant and under his direction, appeared for the defense and protection of the interests of the United States."
>
> The court, upon the evidence, and after considering the briefs and arguments of counsel on both sides, makes the following findings of fact.

On page 8 of said committee report it is mentioned that it often happens that witnesses are widely scattered, and that testimony must be taken in several different places or States, the attendance of counsel both for the United States and for the claimant being necessary.

It is plain, from what has been here stated, taken

from an official source, to which reference may be properly made, that the services of counsel in these cases are purely legal, professional services, rendered by members of the bar of the Court of Claims. Admission to the bar of that court is restricted by rules of the court to those persons who have been admitted to practice in the highest court of the jurisdiction wherein they reside.

It is worthy of more than passing notice, also, that on page 8 of said committee report the following statement is made with reference to claims tried by the Court of Claims under the Bowman and Tucker Acts:

> The reports of the Assistant Attorney General in charge of the defense of cases in the Court of Claims show that since the enactment of the Bowman Act, on March 3, 1883, and of the Tucker Act, on March 3, 1887, practically two claims out of every three that have been referred to that court under these acts have been either dismissed or made the subject of adverse findings, and it further appears that even when allowances have been made by the Court of Claims the claims have been so scaled down or reduced by that court that the total of favorable findings during the long period mentioned of about 28 years, have been only about 8 per cent of the total amounts claimed in all the cases referred.

We quote that official statement for the purpose of showing by the records that the successful prosecution of a claim in the Court of Claims is something more than a merely perfunctory performance on part

of counsel, and that the prosecution of such claims is a matter of great business hazard and risk to counsel when done upon purely contingent fee contracts.

The foregoing will doubtless be sufficient to give to the court a correct general idea as to the nature of services rendered by counsel for claimants in this class of cases.

THE FEE CONTRACT SUED UPON IS VALID.

The later of the two fee contracts, and the one whereunder the case was tried in the Court of Claims, is set forth on page 11 of the record, and reads as follows:

FEE AGREEMENT.

This Agreement Witnesseth:

That I, Thomas N. Arnold, Jr., Administrator of the estate of Thomas N. Arnold, deceased, have employed C. C. Calhoun, of Washington, D. C., as my attorney to prosecute my claims against the Government of the United States for the use and occupation of and damages to real estate belonging to, and for the value of stores and supplies taken from Thomas N. Arnold, deceased, by the Federal forces during the late Civil War, being pending Case No. 13,681 Congressional before the United States Court of Claims, and in consideration of his professional services in the prosecution of said claim I hereby agree and bind my heirs and legal representatives, to pay to him, as heirs or legal representatives as a fee a sum equal to fifty per cent (50%) of the amount which may be collected upon said claim, said fee to be a lien on any warrant which may be issued in payment of said claim.

Witness my hand and seal this 21st day of September, 1909, in the County of Franklin, State of Kentucky.

THOMAS N. ARNOLD, JR.,
Administrator of the Estate of
Thomas N. Arnold.

Witness to signature:
FRANCES P. ARNOLD.
GLENDY B. ARNOLD.

While it would appear that either there are some clerical errors in the transcript or in the original of said contract, its terms are sufficiently plain.

While we will herein show the validity of such contracts, providing for a purely contingent fee in matter of prosecuting a claim against the Government, we will first refer to the concluding part of the contract, providing that the agreed fee is to be a lien on any warrant issued in payment of the claim.

At first glance it might be thought that the decision of this court in Nutt v. Knut, 200 U. S., 12, would be applicable to the contract with Calhoun, to the extent of showing the last quoted provision to be void as in contravention of Section 3477, U. S. Rev. Stats., but careful comparison of the contract involved in the Nutt case with the Calhoun contract here involved, will show the decision in the Nutt case to be here inapplicable, in any part.

In the *Nutt* contract it was provided (emphasis ours):

> And in consideration therefor the party of the second part agrees to pay the party of the first part a sum equal to 33 1/3 per cent of the amount

> which may be allowed on said claim, the payment of which is hereby made a *lien upon said claim* and upon any draft, money, or evidence of indebtedness which may be issued thereon.

It will be noted that, as pointed out in the opinion of this court in the Nutt case, the effect of that contract was to give the attorney an interest *in the "claim" itself,* prior to its examination and allowance, which fact brought the contract provision quoted into collision with the terms of Section 3477, prohibiting assignment of claims against the Government prior to issuance of warrant in payment.

In the instant case, however, the only provision for a lien is that a lien shall attach to any *"warrant* which may be issued in payment of the claim," the lien not to exist, obviously, until in the future, the warrant shall be issued.

In other words, there was no lien provided at the inception of the prosecution of the claim. The lien would first come into existence, per the terms of the contract, *when* and *after* the described *subject-matter* should itself come into being, *i. e.,* the warrant in payment of the claim.

Necessarily, no warrant would be issued in payment of the claim until after the claim had been investigated by some department or tribunal (in this case the Court of Claims), and until after an appropriation had been made by Congress for payment.

Hence the objection to the giving of a lien on an uninvestigated, undecided *claim,* recognized in Section 3477 and in the Nutt case, has no existence in the

present case, where there was no assignment of any interest whatever in the *claim* itself.

As the warrant itself, when issued, may be endorsed and passed from hand to hand, like any check, there can be no objection to the terms of a contract making such warrant, *when issued,* the subject of a lien. As said by this court in McGowan v. Parish, 237 U. S., 285, the object of Section 3477, U. S. Rev. Stats., was to protect the Treasury Department during the investigation and examination of claims; but there is nothing to prevent the payee of a warrant from giving a lien on the *warrant.* This same idea was followed by this court in its memorandum opinion rendered November 18, 1918, in Lay v. Lay, No. 633, October Term, 1918, from which the following is quoted:

> The right to a fund resulting from the payment of an appropriation by Congress to satisfy a judgment for the value of property taken during the Civil War is the issue here involved. The contestants are the heirs at law of the original claimant and persons holding under an assignment by her of all her right to the claim or fund. The court enforced the assignment.
>
> Under the assumption that the claimant was prohibited by the law of the United States (Section 3477, Rev. Stats.) from making an assignment, the heirs at law prosecute error to correct the Federal error thus assumed to have been committed. But the assumption indulged in as to the effect of the law of the United States is without merit. McGowan v. Parish, 237 U. S., 285, 294, and cases cited.

The contract made between Calhoun and his client was evidently so drawn as not to conflict with the terms of Section 3477, and was in no respect opposed to either the letter or the spirit of that statute.

Inasmuch as this provision of the contract practically permits the attorney to make his fee out of the fund brought in by his professional services, it is a very important part of the contract, as otherwise in case of a personally insolvent administrator, it might be contended that the duty to pay the fee for collecting a claim against the Government was a purely personal obligation of the administrator, not enforceable against the estate or the fund.

It is a matter of moment to members of the bar, therefore, that such a provision as here found incorporated in the fee contract be upheld as valid. Without such a contractual provision an attorney would doubtless have his general equitable lien under the law of attorney and client, enforceable against the fund; but there is no necessity for compelling him to resort to that general equitable lien if the same right can be found conferred by the contract of employment.

Having thus covered the validity of the lien provision of the fee contract, we will now refer to the authorities establishing the legality of just such contracts as the one here in suit, and will show that the contract is not contrary to public policy. Public policy is to be gathered from the statutes and prior decisions of the courts, and we will refer both to the statutes and decisions.

FEE CONTRACT NOT OPPOSED TO PUBLIC POLICY OR PRIOR STATUTE.

By act of February 26, 1853 (10 Stat., 161), it was provided (emphasis ours):

> That in lieu of the compensation now allowed by law to attorneys, solicitors, and proctors in the United States courts, to United States district attorneys, clerks of the district and circuit courts, marshals, witnesses, jurors, commissioners, and printers, in the several States, the following and no other compensation shall be taxed and allowed. *But this act shall not be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with the general usage in their respective States, or may be agreed upon between the parties.*

The same provision was carried into the Revised Statutes as Section 823, *and that section is still the law.*

It is therefore plain that, when the fee contracts whereon this suit is based were entered into by counsel and client, there was *express statutory* authority for the payment to counsel appearing in the courts of the United States of "such reasonable compensation for their service * * *, *as* * * * *may be agreed upon between the parties.*" Those words, if significant of anything at all, *sanctioned* the making of fee agreements between counsel in Federal courts, and their clients.

It is to be further noted that, while the Court of Claims was not an existing court when the act of 1853 was enacted, yet it was a court of the United States when the act of 1853 was carried into the Revised Statutes, and therefore, its provisions were just as applicable to counsel appearing before that court as to those in any other Federal court.

That was the law at the time the contract involved in this case was entered into by client and counsel; it was the law during the period that the claim was in process of prosecution in the Court of Claims; it was the law at the time the rights under the fee contract became liquidated by a favorable finding or allowance by the Court of Claims, and was the law when the War Claims Act was passed and approved, *and is still the law.*

The act of 1853 was referred to by this court (prior to enactment of the Revised Statutes), in case of *In re* Paschal, 10 Wall., 483. In that case it was held that counsel had a right to compensation for professional services rendered, and that the statutory fee bills were only applicable so far as counsel fees were concerned, in matter of recovery of costs as between parties to an action, and not as between attorney and client, the court saying (emphasis ours):

> The fee bill adopted by Congress in 1853 recognizes this general rule and, in fact, adopts it. By the 1st section of that Act it is expressly declared that nothing therein contained shall be construed to prohibit attorneys, solicitors and proctors from charging to and receiving from their clients, other than the Government, such

> reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, *or may be agreed upon between the parties.*

This same enactment was referred to in case of Mass., etc., Co. v. Township of Gills Creek, 48 Fed., 145-147, where the court upheld the right of counsel to protection in matter of fees, and said (emphasis ours):

> The courts of the United States seem to protect attorneys in their fees as well as in their taxed costs. In Wylie v. Cox, 15 How., 415, the court protected an attorney by securing him the percentage contracted to be paid him on recovery. In Cowdrey v. Railroad Co., 93 U. S., 354, an attorney was secured the fee he had expressly contracted for. So, also, in McPherson v. Cox, 96 U. S., 404. These were express contracts. As this protection to the attorney is founded upon the idea "of a contract implied by law," and as effectual as if it resulted from an express agreement (*ex parte* Bush, 7 Vin. Abr., 74; Cowell v. Simpson, 16 Ves., 279), *and as the statutes of the United States expressly recognized the right of attorneys to charge their clients reasonable compensation for their services,* in addition to taxable costs (Rev. St. U. S., Sec. 823), it would seem that the United States courts will also protect the implied contract.

The Supreme Court of Tennessee, in passing upon the very question here presented, and after referring to Section 823, U. S. Rev. Stats., said in case of

Moyers v. City of Memphis, 135 Tenn., 263, 186 S. W., 105 (emphasis being ours):

> Applying the principles of these authorities to the agreed facts in the present case, we think it results that, the contract between the parties, although for a contingent fee, *was a legal and valid contract, not against any established public policy,* or contrary to any law or statute of the Government * * *.

The Kentucky Court of Appeals, in considering the similar contract involved in Black v. O'Hara, 175 Ky., 623-627, the decision in which case was followed in the case at bar, said:

> By neither the Federal nor State law is the contract invalid. Section 3477, Revised Statutes of the United States; Nutt v. Knut, 200 U. S., 12; Downie Case, 218 U. S., 345; Ramsey v. Trent, 10 B. Mon., 336; Wilhite v. Roberts, 4 Dana, 172.

See also Newman v. Moyers, 47 App. D. C., 102.

In Lay v. Lay (King & King, intervenors), —— Miss., ——; 79 Sou., 291, affirmed by this Court, the binding effect of a precisely similar contract was adjudged.

As bearing on the general question of public policy, we also call attention to the fact that, from 1864 to 1880, claims for army supplies taken in States not in insurrection were presentable to the Quartermaster General and Commissary General; that from 1871 until 1880 the Southern Claims Commission was

passing upon Civil War claims; that since 1883 the Court of Claims had been trying these cases under the Bowman Act; that since 1887 that court had been trying war claims under the Tucker Act; that since 1911 similar claims have been tried by that court under Section 151 of the Judicial Code; that thousands of these claims have been paid, during this long period mentioned, yet never, until March 4, 1915, did Congress attempt to limit the fees of counsel for professional services rendered claimants. Heretofore the compensation has always been left to be governed by private contracts between claimants and their counsel.

Counsel contracted with clients and gave to the prosecution of these claims their conscientious and earnest efforts covering a period of years, with a knowledge of this long and uniform policy of Congress to permit perfect freedom of contract in these matters.

The case of Taylor v. Bemiss, 110 U. S., 42, involved the compensation of an attorney for prosecuting a war claim before the Southern Claims Commission before mentioned. Concerning the right of a claimant to employ counsel upon an agreement for a contingent fee, this court held that the appointment of Mrs. Bemiss as tutrix of her children, who were beneficiaries of the claim, made it her duty to prosecute the claim, and then said (emphasis ours):

> It would be a queer condition of the law, if, while it imposed this obligation upon her, it gave her no authority to employ counsel to prosecute

> the claim before the only legal tribunal which could allow it; and *if she could employ counsel, it follows as a matter of course, she could make a contract for the amount of their compensation.*

Speaking further, of the validity of the contract made with counsel, which provided for a total counsel fee of *fifty per cent* of collection, this court stated (emphasis ours):

> It was decided in the case of Stanton v. Embry (93 U. S., 548), that contracts by attorneys for compensation in prosecuting claims against the United States were not void because the amount of it was made contingent upon success, or upon the sum recovered. And the well known difficulties and delays in obtaining payment of just claims which are not within the ordinary course of procedure of the auditing officers of the Government, *justify a liberal compensation in successful cases, where none is to be received in case of failure. Any other rule would work a hardship in cases of creditors of small means residing far from the seat of government, who can give neither money nor personal attention to securing their rights.*

The case of Nutt v. Knut, 200 U. S., 12, also upholds the validity of a contingent fee contract for the collection of a Civil War claim. The court there cited with approval the case of Taylor v. Bemiss (110 U. S., 42), and upheld a contract providing for a fee of a sum equal to 33 1/3 per cent of collection.

In the case of McGowan v. Parish (237 U. S., 285), the case of Nutt v. Knut was approved and followed,

thereby again upholding the validity of a contingent fee for collecting a claim against the United States. This later case really goes even further than the prior ones, in upholding the right of counsel to the agreed compensation even though the claimant took the case from their hands previous to actual collection.

The case of Roberts v. Consaul, Adm'r, 24 App. D. C., 551-559, involved an attorney fee for services in prosecuting a Civil War claim in the Court of Claims, on a similar contract to that here presented, and the Court of Appeals said:

> Persons having claims against the United States that must be collected through proceedings in the Court of Claims are practically compelled, in the majority of cases, to employ attorneys and contract with them for fees contingent upon success. Such contracts are not unlawful, and may be enforced according to their terms where fair and reasonable. Taylor v. Bemiss, 110 U. S., 42, 45; 28 L. Ed., 64, 65; 3 Sup. Ct. Rep., 441.
>
> Such contracts not being otherwise opposed to public policy, it would be an unreasonable construction of statutes intended solely for the protection of the United States to extend them thereto.

In case of Buford v. Speed, 74 Ky., 338, it was said:

> "Having a right to make defense, it follows that Buford had a right to employ counsel, for without counsel no defense could be made. In order to secure counsel he must have had a right

> to *contract* with attorneys residing within the enemy's country where the court was sitting in which the counsel had to appear, and to pay them for their services, otherwise the established right to make defense is a delusion and a mockery."

That Congress well knew that services of counsel were necessary to the proper presentation of these claims before the Court of Claims is also made manifest by the House Report No. 97, 63d Congress, 2d Session, on this very bill, wherein the Committee on War Claims, in commenting on the Court of Claims procedure in the claims embraced in the bill, said (page 8):

> In brief, it may be stated that every case tried by the court under the acts mentioned pursues about the same course as does an ordinary case in courts of civil jurisdiction, save that here the court, consisting of five judges appointed by the President and confirmed by the Senate, act as a jury, and determine the facts. All testimony is taken under cross-examination. It often happens that owing to the fact that witnesses are widely scattered, testimony is taken on one case in several different places or States, the attendance of counsel both for the United States and for the claimant being a necessary incident to the taking of depositions.

In Senate Report No. 357, 63d Congress, 2d Session, on this same bill, page 6, the necessity of a claimant securing counsel both in Washington and in other parts of the country, is mentioned.

Congress has also given express recognition to the bar of the Court of Claims. By the Act of January 24, 1855 (13 Stat., 424), it was provided that (emphasis being ours):

> No person after the date of this act shall be admitted to the bar of the Supreme Court of the United States, or at any time after the 4th of March next shall be admitted to the bar of any circuit or district court of the United States, *or in the Court of Claims,* as an attorney or counsellor of such court, or shall be allowed to appear and to be heard in any such court, by virtue of any previous admission, or any special power of attorney, unless he shall have first taken and subscribed the oath * * *.

It is true that said statute was held unconstitutional in *ex parte* Garland, 4 Wall., 333, but it shows that Congress fully recognized the fact that claimants in the Court of Claims were represented by counsel, just as in the Supreme Court, or in the circuit and district courts of the United States.

The fact that no difference was drawn between admission to the bar of that court and admission to the bars of other courts mentioned would seem to show, further, that Congress also recognized the practice of law before the Court of Claims as a legitimate vocation, else it would not have been given this recognition.

We have thus established our premise that the fee contract under which Calhoun rendered his services in the Court of Claims was a valid contract when it was made; it remained valid during the time he was

engaged in prosecuting the claim in that court, and we shall later show that under said contract Calhoun acquired certain property rights of which he could not be deprived by Congressional enactment after performance of his services.

THE FEE LIMITATION FORMING A PART OF THE WAR CLAIMS ACT IS UNCONSTITUTIONAL.

The Fifth Amendment to the Constitution reads as follows:

> No person shall be * * * *deprived of life, liberty or property, without due process of law;* nor shall private property be taken for public use, without just compensation.

It is maintained by defendant in error that the provisions of Section 4, of said Act of March 4, 1915, denying his right to collect from his former client the full compensation due under a valid contract, for his professional services, rendered prior to said enactment, and making defendant in error liable to punishment for misdemeanor in a heavy fine in event he either compels or accepts compliance with the terms of such valid contract, are in direct derogation of his rights under the Fifth Amendment in the following particulars:

First. Said statute attempts to deprive defendant in error of his property without due process of law.

Second. Said statute attempts to deprive defendant in error of his liberty without due process of law.

DEPRIVATION OF PROPERTY.

Consideration will now be given to the unconstitutionality of the fee limitation in the War Claims Act because it seeks to take from defendant in error his property without due process of law.

Defendant in error does not contend that, by reason of his services rendered under his contract with the original claimant, and later with the administrator of the original claimant, he acquired any right of property *as against the United States.* The property right so acquired, by services rendered as per contract, is against the Arnold estate

The claim having been investigated and tried in the Court of Claims, and an appropriation having been made by Congress for payment of the sum awarded, and payment having actually been made, and the amount appropriated (less 20 per cent received through the Treasury Department by defendant in error) being now in the hands of the administrator of the Arnold estate, is chargeable with payment of the residue of the agreed attorney fee.

This right of property of Calhoun was acquired and held under and by virtue of his professional services rendered, in accordance with a valid contract, a contract having express statutory sanction, a contract in no manner opposed to public policy, *and that property right was acquired prior to the enactment in question.* At least from date of allowance of the claim by the Court of Claims, Calhoun had a *chose in action,* as against his client, under his valid contract, *whereunder he had completed his services.*

That a *right of property is thus acquired* by coun-

sel, has been recognized by the courts. In fact, the latest decision of this court dealing with this point (McGowan, executrix, and Brookshire v. Parish, executrix, 237 U. S., 285), goes even further, and holds, in effect, that even *prior* to completion of services of counsel, they have acquired by services rendered under their contract of employment (providing for a contingent fee), such a property right as precludes their being dismissed from the case, without the client becoming liable for payment of the full contingent fee contracted to be paid.

In that case McGowan and Brookshire, lawyers, were employed by Parish to prosecute his claim against the Government, arising from Civil War transactions. Before final success, but after services of value had been rendered by counsel, Parish took the case out of their hands, and the closing steps in collecting the claim were in charge of other counsel. McGowan and Brookshire filed a bill in equity for injunction and to secure the declaration of an equitable lien on the fund about to be paid the executrix of original claimant, who had died pending settlement of the claim. Thereafter McGowan died, and his executrix was substituted in his place. In affirming the action of the Supreme Court of the District of Columbia, sustaining the claim of McGowan and Brookshire, this court held that the attorneys were entitled to their full agreed compensation, even though they had been prevented by act of their client from completely complying with the terms of their employment.

The very fact that the executrix of McGowan was

recognized as entitled to recover (as to his share) on the contract, shows that the right acquired by rendering of the services was a property right; for otherwise, the executrix of McGowan would not be entitled to enforce the right against the executrix of the original claimant. *An executrix takes nothing by virtue of her executrixship save property belonging to the testator.* At death of McGowan he had a chose in action, the right to demand from Parish his agreed compensation for services. Had that chose in action been a purely personal right, it would have abated as to McGowan's interest, at McGowan's death. The very fact that the courts recognized his executrix as party to the suit proves that the chose in action was a right of *property,* which survived the death of McGowan.

Certainly any right which survives to the administrators of a deceased lawyer *must be a property right.*

Attention is also asked to the fact that, in the McGowan-Parish case, it plainly is held that the claimant could not revoke the appointment of his counsel without rendering himself or his estate liable for the agreed compensation of the counsel.

Yet it is clear that, unless the right of counsel, based on the contract, was a *property right,* their employment could be annulled and the contract abrogated at any time, by the claimant, at his pleasure, whim or caprice, without financial liability.

The fact that the claimant could *not* thus dismiss his counsel and abrogate his contract for their compensation, is based on the *property rights* of the attorneys, *under their contract.*

Hence, to deprive them of the rights conferred upon them by their lawful *contract* would be to deprive them of their *property*. The court held that the claimant could not accomplish that end, and we now ask the court to hold that *Congress* can not accomplish by the act in question what the claimant himself could not do. The general law of contracts prevented the claimant from doing this; the Fifth Amendment prevents Congress from doing it.

Here we call the special attention of the court to the fact that the appropriation made by the War Claims Act in question is an *absolute* appropriation in payment of each claim, save for the sole condition that as to the several sums appropriated therein, the same shall be "in full for and the receipt of the same to be taken and accepted in each case as a full and final release and discharge of their respective claims."

In other words, the instant that act was approved by the President, every individual claimant therein named became the *owner* of the sum appropriated to him. He could, on refusal by the Treasury officials to pay his claim, secure a mandamus compelling payment. U. S., *ex rel.*, Parish v. Macveagh (214 U. S., 124).

In Osborn v. Nicholson, 13 Wall., 654, suit was brought on a promissory note, given in 1861, in payment for a slave bought by the maker of the note. The suit was brought after the end of the Civil War, and it was alleged by the maker of the note that the adoption of the Thirteenth Amendment to the Federal Constitution operated to relieve him of his liability. In considering this point, the court said:

> But without considering at length the several assumptions of the proposition, it is a sufficient answer to say that when the Thirteenth Amendment to the Constitution of the United States was adopted, the rights of the plaintiff in this action had become legally and completely vested. Rights acquired by a deed, will or contract of marriage, or other contract executed according to the statutes subsequently repealed, subsist afterwards as they were before, in all respects as if the statutes were still in full force. This is a principle of universal jurisprudence. * * * The proposition, if carried out in this case would, in effect, take away one man's property and give it to another. And the deprivation would be "without due process of law." This is forbidden by the fundamental principles of the social compact, and is beyond the sphere of the legislative authority both of the States and the Nation. * * *
>
> Whatever we may think of the institution of slavery viewed in the light of religion, morals, humanity, or a sound political economy—as the obligation here in question was valid when executed, sitting as a court of justice, we have no choice, but to give it effect.

It is obvious that the note there involved was a mere *chose in action*.

In view of the general tenor of the decisions opposed to our position herein and which we hereinafter discuss (Ralston v. Dunaway, 123 Ark., 12; 184 S. W., 425; and Calhoun v. Massie, 124 Va., ——; 97 S. E., 576), holding that counsel could acquire by their performance of services under valid contracts, no rights whereof they might not be

devested by act of Congress at any time prior to actual payment of the claim, we call attention to some general principles which prove the Arkansas and Virginia decisions to be wholly unsound.

The theory followed by the Arkansas and Virginia courts is that, unless the attorney had a present right to *sue* his client upon his fee contract, no property right existed in the attorney under his contract, which would fall within the protection of the Fifth Amendment; but in so holding, those courts plainly overlooked the obvious legal principle that the *fee contract,* under which counsel's services had been performed, *constituted a chose in action,* and further, that *a chose in action is property,* regardless of whether or not there exists a present right to *sue* thereon.

That a *chose in action* is *property* has not only been established by court decisions, but has been recognized by express Congressional enactment is obvious from the below-cited decisions, and from examination of the following acts of Congress:

Section 11 of the first judiciary act, of September 24, 1789, 1 Stat., 73-79, provides, *inter alia* (emphasis ours):

> * * * nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note *or other chose in action* in favor of an assignee unless * * *.

Again, in Sec. 24, par. 1, of the present Judicial Code, it is provided:

> No district court shall have cognizance of any suit (except upon foreign bills of exchange) to

> recover upon any promissory note *or other chose in action* in favor of any assignee * * * unless * * *.

Obviously, nothing can be assigned and made the basis of a suit for recovery *unless the thing assigned constitutes property.*

As stated in case of Sheldon v. Sill, 8 How., 441-449, in construing the above-quoted section of the first judiciary act:

> The term "chose in action" is one of comprehensive import. It includes the infinite variety of contracts, covenants, and promises, which confer on one party a right to recover a personal chattel or a sum of money from another, by action.

A chose in action is property:

> Enzor v. Hurt, 76 Ala., 595.
> Williamson v. Harris, 57 Ala., 40.
> Sherwood v. Sherwood, 32 Conn., 1.
> Cummings v. Cummings, 51 Mo., 261.
> Trimble v. Mt. Sterling, 12 S. W., 1066; 11 Ky. L. R., 727.
> Winfree v. Bagley, 102 N. C., 515; 9 S. E., 198.
> Engel v. State, 65 Md., 539.
> Buck v. Miller, 147 Ind., 586; 37 L. R. A., 384.
> Boyd v. Selma, 96 Ala., 144; 11 L. R. A., 729.
> Niles v. Mathusa, 162 N. Y., 546; 57 N. E., 184.

In Prudential Ins. Co. v. Hunn, 21 Ind. App., 525-529; 69 Am. St. Rep., 380, the court said:

> "A policy of life insurance is property. It is a *chose in action.*"

The following is quoted from Tiedemann, State and Federal Control of Persons and Property, p. 280, Sec. 92:

> "Property" is defined as any thing or object the value of which one may acquire or own, and one of the commonest divisions of property in the law books is into things in possession and things in action. Things in action, or, to employ the old Norman-French term, *choses in action,* include every claim against another for money or money's equivalent, which can be successfully enforced in a judicial action. It is manifest, therefore, that the constitutions, both national and State, guarantee one in the secure possession of things in action, as well as of things in possession. When the National Bankrupt Law, which cut off the claims of creditors of an insolvent debtor, was claimed to be a violation of the right of property in things in action, it was justified on the ground that the constitution of the United States had expressly authorized the enactment of the law, thereby making it an express exception to the ordinary constitutional guaranty of protection to vested rights (Ogden v. Saunders, 12 Wheat., 269).
>
> It is probably not an exaggerated statement that three-fourths of the private property of the world are things in action, contracts, bonds, notes, open accounts, covenants, mortgages, etc., and the great majority of these things in action are contracts which call for the payment of money.
>
> "The interest in a contract, which, in case of non-performance, can only be reduced into bene-

ficial possession by an action or suit," is property.

Haskell v. Blair, 3 Cush. (Mass.), 534-545.

In Borden v. Bradshaw, 68 Ala., 362, it was held that the term "property" included *a chose in action, i. e.,* a right of action for damages for negligence in the conduct of a ferry.

In Soulard v. U. S., 4 Pet., 511, the word "property," as applied to lands, was defined to include "every species of title, inchoate or complete, and embraces rights which lie in contract, executory as well as executed, * * *." That definition was followed also in Strother v. Lucas, 12 Pet., 410, and in Bryan v. Kennett, 113 U. S., 179.

In Steele v. Gatlen, 115 Georgia, 929-931; 59 L. R. A., 129, it was said:

> "It has been held in numerous cases that a policy of life insurance, even before the death of the insured, is a *chose in action.* See *Ex parte* Ibbetson, 8 Chan. Div., 519; Harley v. Heist, 86 Ind., 196; 44 Am. R., 285; Bushnell v. Bushnell, 92 Ind., 503; Hutson v. Merrifield, 51 Ind., 24; 19 Am. Rep., 722; N. Y. Life Ins. Co. v. Flack, 3 Md., 41; 56 Am. Dec., 742; Ionia Bank v. McLean, 84 Mich., 625; Palmer v. Merrill, 6 Cush. (Mass., 282). A policy of life insurance, being a *chose in action* arising upon a contract, may, under the provisions of our code, be assigned so as to vest the title in the assignee."

In Carlton v. Carlton, 72 Me., 115-116; 39 Am. Rep., 307, the court said:

"The word 'property' includes *choses in action* as well as choses in possession. It includes money due as well as money possessed. It includes money due for personal services, as well as money due for anything else. In its broadest sense it includes everything which goes to make up one's wealth or estate."

In Haskell v. Blair, 57 Mass. (3 Cush.), 535, the court said (emphasis ours):

"But if the words '*chose in action*' when first used with reference to an assignment or transfer thereof, necessarily imported a present right of action (a question which we have not examined), they have long since acquired a more extended meaning. As generally defined, 'a right not reduced into possession.' A definition which includes the present case is 'the interest in a contract which, in case of non-performance, can only be reduced into beneficial possession by an action or suit.' A note, bond, or other promise, not negotiable, is denominated a *chose in action, before the promissor or obligor is liable to an action on it, as well as after.*"

In Houston & Texas Cent. R. Co. v. State of Texas, 170 U. S., 243-261, this Court held that the right of the company, under its charter as amended by various legislative acts, *to build* a railroad, and to thereby *earn* the grant of certain lands, constituted *property,* and that a legislative act attempting to deprive the company of such right, *deprived it of its property without due process of law.*

The question may be asked, "*When* did Calhoun

acquire such a vested right in or under his fee contract, as could not be taken from him without due process of law?"

Under the authorities above cited, it is certainly within the bounds of reason to say that the rights of Calhoun, under his contract, to prosecute the Arnold claim, for a specified compensation became vested as soon as he accepted the employment, and began rendering his services. The case of Price v. Haeberle, 25 Mo. App., 201, certainly would sustain such a contention.

In that case Mrs. Roberts placed a claim in the hands of Price, as her attorney, and agreed that his fee should be a portion of recovery. A trial was had and lost during lifetime of Mrs. Roberts. She then died. Price, still acting as attorney for her estate, secured a new trial and prevailed on the new trial, and sustained the judgment on appeal in favor of Haeberle, administrator of Roberts. Haeberle then sought to repudiate liability to Price for his attorney fee. The court said (emphasis ours):

> "It thus appears that the plaintiff had made with the decedent, in her lifetime, *a contract the performance of which he had entered upon, and under which a substantial right had accrued to him. At the time of her death that right was in the nature of a vested right,* subject, of course, to be defeated by failure on his part to prosecute to the end the duties which he had engaged to perform under the contract. In this state of the case his contract was not determined by the death of Mrs. Roberts, nor had the administrator any power to determine it without cause, if he had been so minded."

The case of Roberts v. Consaul, 24 App. D. C., 551-559, involved an attorney fee for collecting a Civil War claim, which, like the claim here involved, had been prosecuted before the Court of Claims, and had been made the subject of favorable findings of fact which had been made the basis of an appropriation by Congress, and the court there said:

> The services of the attorney, as contracted for, were performed and the consideration therefor earned when the judgment was recovered. All that remained for him to do, if permitted, was to receive the draft for the appropriation made by Congress for the payment of the judgment.

It is plain that the right of an attorney to his agreed compensation for prosecuting such a claim, becomes a vested property right at least on the securing of a favorable report or allowance of the claim at the hands of the Court of Claims.

After that has been secured, the attorney may be obliged to wait, just as the claimant may be compelled to wait, for the making of an appropriation by Congress for payment of the claim; but from the time such a report is made by the Court of Claims to Congress, the attorney's right to an agreed percentage of the sum represented by the appropriation when finally made, is a *vested* right.

Along the same line, is the case of *Schooner Zilpha*, 40 Court of Claims, 200. In that case a motion was made to substitute new counsel in a French Spoilation case, *after* decision of the case by that court. In denying the motion to substitute, the court said:

> In this class of cases the report of the court on the merits is equivalent to a judgment; and after judgment has been rendered in an ordinary suit the rights of both client and attorney are always regarded as having become fixed; and this is peculiarly applicable in a case where the client has lost nothing and has secured all that his suit was instituted to obtain.

The uncertainty as to *time of payment*, or even the possible uncertainty as to whether Congress may appropriate for the entire amount reported by the Court of Claims, does not affect the character of this *vested* or *property* right, although they may affect its extent or value. The same uncertainties of time and value apply equally to an estate in remainder, in real estate, and more especially to a *contingent* remainder, but those uncertainties do not alter the fact that such estates constitute *vested property* rights. In other words, a *present* right of *enjoyment* is not a necessary incident to the ownership of property, either real or personal.

In Ralston v. Dunaway (123 Ark., 12; 184 S. W., 425), the Arkansas court said, in effect, that Congress might never appropriate for payment of the claim of Mrs. Dills, and argued that, *because of that uncertainty,* counsel could not have any property right under their fee contract. That the reasoning of the Arkansas court was fallacious in that respect is apparent from comparison with a case decided by this Court.

In case of Erwin v. U. S., 97 U. S., 392, the point was whether or not a claim under what is called the

Captured and Abandoned Property Act, for money in the Treasury as a result of seizure and sale of personal property during the Civil War, without judicial proceedings, constituted *"property,"* which would pass to an assignee in bankruptcy.

The court held that such a claim was "property," and did pass to the assignee, and remarked:

> Demands against the Government, if based upon considerations which would be valid between individuals, such as services rendered or goods taken, are property, although there be no Court to investigate and pass upon their validity and their recognition and payment may depend upon the caprice or favor of the Legislature.

It would seem to follow that, if the Arnold claim which was prosecuted by Calhoun, itself constituted *"property,"* and which admittedly goes to the administrator, then the rights of Calhoun to his compensation for prosecuting that claim, must likewise be "property."

In other words, payment of Calhoun's agreed compensation, like payment of the claim of his client, must "depend upon the caprice or favor of the Legislature," but if that fact does not detract from the "property" character of the claim, then neither does it detract from the "property" character of Calhoun's right to his agreed compensation.

In this connection, and by way of continuing the statement above made as to estates in contingent remainder (which may *never* be reduced to possession

or enjoyment), constituting *property,* nevertheless, we refer to a few cases covering that point.

In case of Martin and Earle vs. Maxwell, 86 S. C., 1, 138 Am. St. Rep., 1012, the Court said:

> "It is true, as has been often said, that a contingent remainder is not technically an estate, but a mere possibility of an estate, in the future, but that is very far from saying that it is not property. The term property, used in the bankruptcy act, is of the broadest possible signification, embracing everything that has exchangeable value, or goes to make up a man's wealth—every interest or estate which the law regards of sufficient value for judicial recognition."

See, also, Clarke vs. Fay, 205 Mass., 228; 27 L. R. A. (N. S.), 454.

The case of Green vs. Edwards, 31 R. I., 1; 77 Atl., 188, decided in 1910, was made the subject of an elaborate opinion, and, after review of the authorities, it was held that an estate in remainder, either contingent or vested, was *property,* and that any legislative act attempting to bar the remainder was unconstitutional, as constituting the deprivation of property without due process of law. After quoting from the State and Federal constitutions, the Court said:

> We are of the opinion that, as urged by the respondents, the statement of the general principle of law applicable to estates-in-tail, and of the nature of remainders limited thereon, is most

logically and satisfactorily set forth in Tiedemann, State and Federal Control of Persons and Property, pp. 622-3, as follows:

"To declare that hereafter no estate-tail or use shall be created, does not infringe any vested right, either of the vendor or vendee, or any third person in privity with either of them, but the effect would be very different if the statutes were made applicable to the existing estates of the prohibited kind. Whether the estate-tail was converted into a fee-simple or divided into a life estate in the first taker and a contingent remainder in the heirs of his body, or if the tenant-in-tail has the power given him to convert the estate into a fee simple by a conveyance, in any one of these three cases of legislation, the application of it to existing estates-tail would violate the constitutional prohibition of interference with vested rights. Of course, the heirs of the body have no vested rights, but the reversioner or remainderman after the estates-tail has. * * *"

In Pitts vs. Curtis, 4 Ala., 350, it was held that a right of remainder in the services of a slave, bequeathed to another for a term of years, constituted property.

The rights of Calhoun under his fee contract, and after performance of his services thereunder, and before the making of an appropriation by Congress for payment of the Arnold claim, may be likened, also, to the rights of an insured under a policy of fire insurance. Under such a policy or contract, the insured has no present right to *sue* the insurance company, because there there has as yet been no loss. It may

be that there never will be any loss by fire, and in that event, the insured never can collect anything from the company. But the very value of the policy is the right to collect from the company on the happening of a certain event, i. e., a loss by fire. Certainly the right of the insured is a *property* right, though not accompanied by any present right to *sue* thereon.

So, in the case at bar, the value of Calhoun's fee contract lay in the fact that, upon payment of the Arnold claim, or in event of payment, a certain sum would become due and payable from Arnold or his estate, to Calhoun. That right in Calhoun was obviously a valuable property right. If Calhoun had died prior to payment of the Arnold claim, that property right would have passed as such to his administrator or executor, and could have been enforced, just as McGowan's property right in his contract fee was held to have passed to his executrix, in said case of McGowan vs. Parish, 237 U. S., 285.

Having clearly established the legal proposition that the right of defendant in error, under his fee contract, was a *property right*, i. e., a *chose in action*, we now ask attention to some authorities on the general subject of the impairment of property rights by legislation, or, to use the words of the Fifth Amendment, depriving persons of property without due process of law.

In Pacific Mail Steamship Co., vs. Joliffe, 2 Wall., 450, the Court, speaking by Justice Field, said:

> The claim of the plaintiff below for nalf pilotage fee, resting upon a transaction regarded by the law as a quasi contract, there is no just

ground for the position that it fell with the repeal of the statute under which the transaction was had. When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute.

Willoughby on the Constitution, Sec. 476, says (emphasis ours):

> No specific inhibition is laid upon the Federal Government by the Constitution with reference to the impairment of the obligation of contracts. That Government is, however, forbidden by the Fifth Amendment to deprive persons of property without due process of law, or to take private property for public use without just compensation. *In so far, then, as contract rights may be treated as property they are protected from direct impairment by Federal action.*

On this same point, the following is quoted from Tiedemann, State and Federal Control of Persons and Property, p. 853, Sec. 178 (emphasis ours):

> The constitutional provision *against impairing the obligation of contracts* is held to be binding only upon the *States. But there can be no doubt that similar action by Congress would likewise be unconstitutional, because it would deprive one of his property without due process of law.*

> Very little difficulty is ever experienced in determining when, and to what extent an enactment impairs the substantive rights of parties to an existing contract, and when such an impairment of the obligation comes within the constitutional inhibition. *The rule is very plain that no impairment of the substantive rights under a contract is permissable by subsequent legislation.*

Recognition of the correctness of the above-stated theory that legislation which impairs the obligation of a *contract* likewise deprives a party to that contract of his *property* without due process of law, and therefore, that legislation which, if enacted by a State, would be in contravention of the Fourteenth Amendment, if enacted by the Nation would be equally in contravention of the Fifth Amendment, is found in Houston & Tex. Central R. Co. vs. State of Texas, 170 U. S., 243-261, where the court said:

> It follows that Sec. 6 of Article 10 of the Constitution of Texas as given effect by the State courts impairs the obligation of the contract *and deprives the company of its property without due process of law.*

In the Sinking Fund Case of U. P. R. R. Co. vs. U. S., 99 U. S., 700, the court apparently had the same idea in mind when it said:

> The United States can not, any more than a State, interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws im-

pairing the obligation of contracts, but, equally with the States, they are prohibited from depriving persons or corporations of property without due process of law.

While the decision in case of Wilkinson vs. Leland, 2 Peters, 627-657, dealt with the enactment of a State legislature, the following language of Justice Story would seem equally applicable to the general question here involved:

> To all that has been said at the bar upon the danger, inconvenience and mischiefs of retrospective legislation in general, and of acts of the character of the present in particular, this Court has listened with attention, and felt the full force of the reasoning. It is an exercise of power which is of so summary a nature, so fraught with inconvenience, so liable to disturb the security of titles, and to spring by surprise upon the innocent and unwary to their injury, and sometimes to their ruin, that a Legislature invested with the power can scarcely be too cautious or too abstemious in the execution of it.
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> * * * * * * *
>
> That Government can scarcely be deemed free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any

> general grant of legislative authority, or ought to be implied from any general expressions of the will of the people.

The following is quoted from Cooley's Constitutional Limitations (6th ed.), page 439 (emphasis ours):

> And Chancellor Kent, in speaking of retrospective statutes, says that while a statute "affecting and changing vested rights, is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void," yet that "this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, *provided they do not impair contracts, or disturb absolute vested rights.* (Citing Kent, Com., 455.)

The cases of Union Pacific Railroad Co. vs. U. S., 99 U. S., 700, and of C. P. R. R. Co. vs. U. S., 99 U. S., 727 (Sinking Fund Cases), involved the right of Congress to enact that Sinking Funds should be established by the companies to provide payment for bonds upon their maturity. It was held that this authority existed, because *Congress originally reserved the right to amend the charters of the companies.*

After holding that Congress had reserved the right to amend the charter of the company, the court said:

> That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, * * *.

LIBERTY OF CONTRACT GUARANTEED.

In a certain sense it may be said that the statute here involved does not directly impair the liberty of *making* a contract, but it does in terms operate to deprive defendant in error of his liberty of either enforcing compliance by his client with the terms of a valid contract, or even of *accepting* from an honest client the agreed compensation in excess of a sum equal to 20% of the sum collected upon a claim.

Assuredly, if the liberty of *making* lawful contracts is one protected by the Fifth Amendment, then the liberty of *enforcing or receiving compliance* with such contracts, *previously made and previously executed* on one side, must receive equal protection.

While the term "contract" is not found in the Fifth Amendment to the Constitution, the word "liberty" therein used has been often construed by the courts as meaning something vastly broader than the mere absence of physical duress.

As stated in numerous decisions, in effect, under our Constitution the words "liberty," and "property," are sometimes of nearly the same meaning, so that it is impossible to draw any sharp line between the two words. Hence it will be noted that quotations from decisions under the heading of "Liberty," will be found to often overlap and cover also the heading "Property."

In Adair vs. U. S., 208 U. S., 161, the court had before it the question of the constitutionality of an act of Congress declaring it a criminal offense for an agent or officer of an interstate carrier to discharge an employee because of his membership in a labor

organization. In holding the act to be unconstitutional, the court, speaking by Justice Harlan, said (emphasis being ours):

> The first inquiry is whether the part of the 10th Section of the Act of 1898 upon which the first count of the indictment was based is repugnant to the *Fifth Amendment* of the Constitution, declaring that no person shall be deprived of liberty or property without due process of law. In our opinion that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by that amendment. *Such liberty and right embrace the right to make contracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's own labor;* each right, however, being subject to the fundamental condition that no contract, whatever its subject-matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with public interests, or as hurtful to the public order, or as detrimental to the common good.

In Allgeyer vs. Louisiana, 165 U. S., 578, 589, 590, the court was considering the language of the Fourteenth Amendment, prohibiting the States from passing any laws depriving any person of life, liberty or property, without due process of law, the language of the Fifth and Fourteenth Amendments being identical in this prohibition, and the court said (emphasis ours):

> The liberty mentioned in that amendment means not only the right of the citizen to be free

from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; *to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.*

That language was quoted with approval in case of Williams vs. Fears, 179 U. S., 274, in U. S. vs. Joint Traffic Assn., 171 U. S., 505-572, and in Addystone Pipe and Steel Co. vs. U. S., 175 U. S., 211.

Practically the same construction of the words "liberty" and "property," as used in these amendments, was given by the court in Mathews vs. People, 202 Ill., 389, where the court said (emphasis ours):

It is now well settled that *the privilege of contracting is both a liberty and a property right. Liberty includes the right to make and enforce contracts, because the right to make and enforce contracts is included in the right to acquire property.* Labor is property. To deprive the laborer and the employer of this right to contract with one another is to violate Sec. 2 of Article 2 of the Constitution of Illinois, which provides that

"no person shall be deprived of life, liberty or property without due process of law."

It is equally a violation of the Fifth and Fourteenth Amendments to the Constitution of the

United States, which provides that no person shall be deprived of life, liberty or property without due process of law.

In *ex parte* Garland, 4 Wall., 333, the Court said:

> The attorney and counsellor, being, by the solemn judicial act of the Court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the Court, or at the command of the Legislature. It is a right of which he can only be deprived by the judgment of the Court, for moral or professional delinquency.

With reference to what the Court said in that case, it may be pertinently asked of what value is the right to appear in court and argue causes for suitors, if, *after* the attorney has performed these functions of his profession, he can be deprived by act of Congress of the fruits of his labors? Of what value is a right which can be made barren of all tangible results to its possessor?

Can it be said that there exists any real liberty on part of an attorney whose contractual rights are thus denied him as is sought to be done by the act in question?

In the case of Coffeyville Vitrified Brick & Tile Co. vs. Perry, 69 Kans., 297-299, which lays down the law substantially as in Adair vs. U. S., 208 U. S., 161, the Supreme Court of Kansas said (emphasis ours):

> The right to follow any lawful vocation and to make contracts is as completely within the pro-

tection of the Constitution as the right to hold property free from unwarranted seizure, or the liberty to go when and where one will. *One of the ways of obtaining property is by contract. The right, therefore, to contract can not be infringed by the Legislature without violating the letter and spirit of the Constitution.*

In the case of State vs. Kreutzberg, 114 Wis., 530-533-534, the theory of the Adair case was announced, and the court said:

> It has become settled, for example, that "liberty" does not mean merely immunity from imprisonment, and that "property" is not confined to tangible objects which can be passed from hand to hand; that within the former word is included the opportunity to do those things which are ordinarily done by free men, and the right of each individual to regulate his own affairs, so far as consistent with the right of others; and within the latter, those rights of the possession, disposal, management and of contracting with reference thereto, which render property useful, valuable and the source of happiness, right to pursuit of which is preserved.

In this case the court also states that it is well established that the words "liberty" and "pursuit of happiness" include the right of private contract, and that a deprivation of the right of private contract is equally a deprivation of "liberty."

In Goldfield Cons. Mines Co. vs. Goldfield Miners' Union, 159 Fed., 500-515, following the same principle as the Adair case, and holding a State statute unconstitutional, the court said:

The terms "life, liberty and property" as used in the Federal Constitution, embrace every right which the law protects. These include not only the right to hold and enjoy, but also the means of holding, enjoying, acquiring and disposing of property. The right to labor is property. It is one of the most valuable and fundamental of rights. The right to work is the right to earn one's subsistence, to live and support wife and family. The right of master and servant to enter into contracts, to agree upon the terms and conditions under which one will employ and the other will labor, is property. * * *

Both parties are free to enter into, or refuse to enter into this contract.

The court further said (emphasis being ours):

> * * * *under our system of government, every man has the right to enjoy his liberty* and property until it is taken away from him by due process of law. To guard these rights is a true end and aim of our civilization. *The existence of such a right in one man necessarily imposes upon every other man the duty to respect it, and upon the Government and the courts the duty to guard and protect it.*

The case of State vs. Goodwill, 33 W. Va., 179 follows the reasoning in the Adair case, and in speaking of contracts and the right to contract, the court said:

> No one questions the position that, unless the Government intervened to protect property and regulate trade, property would cease to exist, and trade would exist only as an engine of oppression; but this does not authorize the Government

> to do for its people what they can do for themselves,

meaning that the Government can not make contracts for its citizens.

The case of Goodcharles vs. Wigeman, 113 Pa. St., 431, was along similar lines, and the court said of the statute of the State:

> The first, second, third and fourth sections of the Act of June 29, 1881, are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the Legislature to do what, in this country, can not be done; that is, to prevent persons who are *sui juris* from making their own contracts.

In case of Dubuque & Sioux City R. R. Co. vs. Richmond, 19 Wall., 584, it was urged that the contract was invalid because it laid a burden on interstate commerce. In holding the contract valid, and in referring to the matter of public policy involved in the general question, the court, speaking through Justice Field said (emphasis being ours):

> When counsel speaks of the public policy established by the Acts of Congress mentioned, he must mean nothing more than that the acts were intended to facilitate commercial intercourse among the States. Undoubtedly such was the case, and it is of great public interest that such intercourse should be free and untrammelled. But if comparisons may be made with respect to a subject of this nature, *we should say that the observance of good faith between parties, and*

the upholding of private contracts, and enforcing their obligations, are matters of higher moment and importance to the public welfare, and far more reaching in their consequence.

As containing a general declaration of public policy being in favor of the enforcement of contracts, we refer to the case of Baltimore & Ohio Ry. Co. vs. Voigt, 176 U. S., 498-505, where the court said:

> At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare. It is well said by Sir George Jessel, M. R., in Printing & N. Registering Co. vs. Sampson, L. R., 10 Eq., 465:
>
> > It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.

In Frorer vs. People, 141 Ill., 171 (reaffirmed in 142 Ill., 387), the Court said:

> The privilege of contracting is both a liberty and a property right, and if A is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which B and C are thus allowed by law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract.

The decision in case of Wilson vs. New (Adamson Act Case), 243 U. S., 332, has a direct bearing on the point under discussion.

In passing upon the constitutionality of the Adamson Act, the Court said (pp. 346-347):

> That common carriers by rail in interstate commerce are within the legislative power of Congress to regulate commerce is not subject to dispute. * * *.
>
> It is also equally true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standard is not subject to be controlled or prevented by public authority.

If the right of interstate common carriers to contract with their employees as to their *future* compensation is "*primarily private,*" and if the "*giving effect to such agreed on standard is not subject to be controlled or prevented by public authority,*" how much greater is the reason for holding that, as be-

tween *private* persons who have legally agreed in advance as to compensation to be paid by one to the other, for the doing of a lawful act, Congress cannot arbitrarily wipe out the contractual right of the party who has already performed his part of the contract.

Obviously, if Congress could not abrogate contracts between interstate common carriers and their employees as to *future* compensation, it could not change such contracts as to services *already performed.* It would seem that what Congress may not do with relation to interstate commerce it may not do as between private persons, and more assuredly not with relation to existing contracts covering services *previously rendered* in accordance therewith.

CLASSES OF CLAIMS WHEREIN CONGRESS HAS LIMITED ATTORNEY FEES.

Acts All Prospective in Operation.

The general classes of cases or claims wherein Congress has limited counsel fees are:

1. Pensions.
2. Indian Depredation Claims.
3. Claims for back pay and bounty.

It may be suggested that the right of Congress to restrict the amount of attorney fees has been exercised and sustained, with regard to other classes of cases, and that this fact is material to the consideration of the present case.

While anticipating such a possible suggestion may unduly extend the scope of this brief, it is the desire of defendant in error, as it is the desire of all members of the bar similarly situated, that this court

have before it everything bearing upon the general point involved, to the end that the court may have all possible information and light.

PENSIONS.

As is well known, a pension is not a matter of right; it is not a claim; it is, when granted, a mere bounty given by way of recognition of services rendered either by the pensioner or by a member of his family. So far as it is a continuing thing, the pension is subject to discontinuance at the will of Congress.

If a pensioner dies, his legal representative can not even receive the pension accrued before the death of the pensioner, unless for the purpose of paying expenses of last illness and funeral charges (Act March 2, 1895, 28 Stat., 964).

Even in limiting counsel fees in these three classes of claims, however, Congress did not attempt to act arbitrarily, as we shall show.

In the Act of June 20, 1878 (20 Stat., 243), limiting attorney fees in pension cases, Congress recognized the validity of contracts theretofore made and filed, pursuant to the previous law, in the Pension Office, the Act, so far as here material, reading as follows (emphasis being ours):

> It shall be unlawful for any attorney, agent or other person to demand or receive for his services in a pension case a greater sum than ten dollars. No fee contract shall hereafter be filed with the Commissioner of Pensions in any case. *In pending cases in which a fee contract has heretofore been filed, if the pension shall be*

allowed, the Commissioner of Pensions shall approve the same to the amount of the fee to be paid at the amount specified in the contract.

It is readily seen that the limitation of attorney fees in pension cases was purely *prospective* in its operation. The limitation did *not* apply to cases then in process of adjudication, and wherein services of attorneys had already been rendered.

The leading case in matter of fees for prosecuting pension applications is Frisbie vs. U. S., 157 U. S., 160, and there a pension had been granted under the Act of June 27, 1890 (26 Stats, 182-183), which act greatly liberalized the pension law, and which *same* act provided that any agent, attorney or person charging a fee of more than ten dollars for *"prosecuting any claims under the provisions of this act,"* should be guilty of a misdemeanor and subject to certain prescribed punishment.

In holding that fee limitation constitutional, the Court said (emphasis ours):

> While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of Government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purpose of lottery tickets; to the minor the right to assume any obligations, except for the necessaries of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in

any employment from any contract in the course of that employment *which is against public policy*. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services or property.

The pension granted by the Government is a matter of bounty. "No pensioner has a vested legal right to his pension. Pensions are the bounties of the Government, which Congress has the right to give, withhold, distribute, or recall, at its discretion." (Walton vs. Cotton, 60 U. S., 19 How., 355; U. S. vs. Teller, 107 U. S., 64-68.)

Congress being at liberty to give or withhold pensions, may prescribe who shall receive, and determine all the circumstances and conditions under which any application therefor shall be prosecuted. No man has a legal right to a pension, and no man has a legal right to interfere in the matter of obtaining pensions for himself or others. The whole control of that matter is within the domain of Congressional power (U. S. vs. Hall, 98 U. S., 343). Having the power to legislate on this whole matter, to prescribe the conditions under which parties may assist in procuring pensions, it has the equal power to enforce by penal provisions compliance with its requirements. There can be no reasonable question of the constitutionality of this statute.

It will be observed that the theory of the Court in that case was just the one we have above suggested, *i. e.*, that, in granting or extending a privilege, Congress may simultaneously lay certain conditions upon persons, either claimants or counsel, availing themselves of such privilege or extension. It by no means

follows, however, that Congress may impose such conditions upon counsel, *after* services have been fully rendered, under valid contracts, and make such conditions practically *retroactive* in a manner to deprive counsel of their property rights, acquired under their *contracts,* and enforceable against their clients.

INDIAN DEPREDATIONS.

What are commonly termed "Indian Depredation" claims are *not* constitutional demands *against the United States;* as indicated by their very name, they are for reimbursement for damages suffered by citizens from "depredations" committed by tribes or members of tribes of Indians supposedly in amity with the Government. As is known, practically all tribes have some funds in the hands of the Government, and such claims as these are prosecuted jointly against the tribe liable for the acts of its members, and the United States, *but,* the United States appears *only as guardian of the Indian tribe.* While a judgment secured in such case is paid by the Government, directly, yet such payment is *charged against the account of the proper tribe,* and so is not ultimately paid by the Government.

In the Indian Depredation Act of March 3, 1891 (26 Stat., 851), the Court of Claims was for the first time opened to presentation of such claims. The only remedy theretofore existing was inadequate, being before the Interior Department and barren of tangible result. That act did prescribe the fees to be allowed by the Court of Claims. Counsel were not compelled to avail themselves of the new remedy,

however, unless they chose to do so and to pay the price therefor in the regulation of their fees. Obviously, *services* before the Court *could not have been rendered prior to the enactment of that jurisdictional act.* Hence, regulation of fees did *not* deprive counsel of their agreed compensation for services *already* rendered in a court of the United States. That fee limitation merely *laid a condition on the right to sue in the Court of Claims,* as expressly stated by this Court, in a case hereinafter cited.

The Indians being wards of the Nation, and the claims themselves being for all kinds of *depredations,* not based on the taking for use of any property, the position of the Government with relation to that entire subject was such as to properly subject the prosecution of the claims to regulation by the Government.

In those cases the United States Government is sued *as guardian* of the Indians and, as stated in case of Lone Wolf vs. Hitchcock, 187 U. S., 553, Congress has from the beginning of our Government exercised plenary power over the affairs of Indian tribes.

Under the general conditions surrounding all Indian affairs, therefore, the Government has undoubted authority to legislate freely concerning all matters pertaining to them.

We ask, however, that the court bear in mind that the *very same act which opened the Court of Claims to these Indian Depredations, also limited counsel fees.* So far as the previous prosecution of such claims before the Interior Department, the later act is to be construed either as taking away the former *remedy,* a thing within the power of the legislature,

or, as furnishing a new and *additional* remedy, and in *either* construction, there would be no deprivation of any rights *already earned.*

Stated differently, any attorney who represented such a claim had the privilege, if he saw fit, to stand on any rights secured by presentation of the claims before the Interior Department, and it might have been possible to secure relief based thereon. If, however, the attorney elected to bring the claim before the Court of Claims, where he would have the benefit of an orderly procedure, before a judicial tribunal, *he knew that the price of admission,* as far as his rights as counsel were concerned, *was the limitation of his fee.*

The leading case on the matter of counsel fees in Indian Depredation claims is Ball vs. Halsell, 161 U. S., 72. In sustaining the constitutionality of the Act of Congress which permitted suits on such claims in the Court of Claims, and which also contained the provision limiting counsel fees, the court said:

> It is an established principle of jurisprudence, in all civilized nations, that the sovereign can not be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals or by another state. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public re-

quires it. (Beers vs. Arkansas, 20 How., 527-529; *Re Ayers,* 123 U. S., 443-505; Hans vs. Louisiana, 134 U. S., 1-17.

It will be borne in mind that the limitation of counsel fees in Indian Depredation claims was sustained, however, as being a condition laid by Congress on the *right to sue.* That act did not, like the one here involved, seek to enact such limitation *after* the suit had been conducted to a termination in the Court of Claims. That Indian Depredation act laid the condition *in advance* of the bringing of the suit, which is plainly a feature which distinguishes the case of Ball vs. Halsell from the one at bar, as hereinbefore pointed out.

SOLDIERS' BOUNTIES, ETC.

As to the third class of claims wherein Congress has seen fit to limit fees of attorneys, *i. e.,* those of former soldiers for back pay and bounty, which were prosecuted before the accounting officers, and not before a court, the Urgent Deficiency Act of Dec. 22, 1911 (37 Stats., 47-49), provided that no agent or attorney should demand or accept any fee for services in connection with such claims *"filed after the passage of this Act."*

It will be noted that no attempt was made to interfere at all with contracts in cases *previously* filed and then in process of settlement, or already allowed, as was done by the war claims appropriation act under consideration. That prohibition in the back pay and bounty claims related solely to services in claims *thereafter* filed.

It is seen, therefore, that in all these classes of claims or cases wherein fees were limited, Congress was careful to make the limitation operate *in futuro* only, and attorneys *thereafter* proceeding to exercise the right to represent such claims or matters, did so with a full knowledge of the restrictions upon their rights to contract for their fees.

It is evident, however, that when the legislation covering those classes of cases or claims is compared with the attempt of Congress to limit counsel fees in claims covered by the war claims appropriation act of March 4, 1915, only *contrast* appears, and the legislation on these other matters, and decisions rendered under those various acts limiting fees can have no application to the instant case, as establishing the validity of the fee limitation in the war claims act.

PRIOR DECISIONS ON THE STATUTE INVOLVED.

The same statute here involved has been made the subject of decision by several other courts of appellate jurisdiction.

In the following cases the fee limitation has been adjudged unconstitutional and void:

Moyers vs. Memphis, 135 Tenn., 263; 186 S. W., 105.

Black vs. O'Hara, 175 Ky., 623; 194 S. W., 811.

Lay vs. Lay, 118 Miss., ——; 79 Sou., 291.

Newman vs. Moyers, 47 App. D. C., 102.

King vs. Pons, Admr., decided by Supreme Court of Florida, April 10, 1919.

In two cases, however, the validity of the fee limitation was sustained, these cases being:

Ralston vs. Dunnaway, 123 Ark., 12; 184 S. W., 425.
Calhoun vs. Massie, 124 Va. ——; 97 S. E., 576.

Up to the present, therefore, five Appellate Courts and numerous inferior courts in Louisiana, Alabama, Missouri, Mississippi, Maryland, Kentucky and Tennessee have sustained the position here taken by the defendant in error, while two Appellate Courts and some inferior courts in Arkansas and Virginia have sustained the constitutionality of the statute.

Of course these prior decisions cannot control the decision of this court, but if one line of decisions is found to be characterized by clearness of reasoning, while the other line is found to be otherwise, then it is needless to say, the line of decisions founded on a logical exposition of constitutional principles may be regarded at least as persuasive.

It may be here remarked that the Arkansas decision was the first decision on this point, and the courts of Tennessee, Mississippi, Florida and Kentucky, and the Court of Appeals of the District of Columbia declined to follow the Arkansas Court.

The Mississippi decision became final by affirmance thereof by this court in the memorandum opinion of this court in Lay vs. Lay, No. 633, October Term, 1918, rendered November 18, 1918.

We shall later refer to the opinions of the Arkansas

and Virginia courts, and show wherein they plainly erred through misconstruing the case of Ball vs. Halsell, 161 U. S., 72.

In Moyers vs. City of Memphis, 135 Tenn., 263; 186 S. W., 105, the attorneys who had collected the claim of the city received 20% from the Treasury Department, and then sued the city for the balance of the contract fee. Under the practice of the State, the suit was brought in the Chancery Court; decree was for complainants, and on appeal that decree was affirmed by the State Supreme Court.

The opinion contains a review of many authorities, and after careful consideration the court said (emphasis ours):

> Applying the principles of these authorities to the agreed facts in the present case, we think it results that, the *contract* between the parties, although for a contingent fee, *was a legal and valid contract,* not against any established public policy, or contrary to any law or statute of the Government; and that *complainants, having already performed the contract on their part,* and become entitled to the compensation agreed on, upon the payment of the claim by the Government, *had a vested property in the same,* which could not be destroyed by an arbitrary act of Congress; and therefore, that Section 4 of said Act of March 4, 1915, in so far as it undertakes to deprive complainants of the benefits of their contract, *is void* under the Fifth Amendment of the Constitution.
>
> It must be remembered that *the services of complainants had already been performed, and that their interest and rights under the contract*

had already become vested, subject to be defeated, it is true, by the failure of Congress to make the necessary appropriation to pay the claim in question. *It should be noted, also, that this Act, Section 4, is not a general law of the land, but applies only to the particular claims therein provided for.*

It follows, therefore, that complainants, notwithstanding Section 4, of the Act of Congress of March 4, 1915, are entitled, as against the City of Memphis, to recover the balance of their compensation as agreed on.

In Black vs. O'Hara, 175 Ky. 623; 194 S. W., 811, the Kentucky Court of Appeals said, of this same statute:

> Congress was without power to dictate, upon the one hand, how the claimant should enjoy or use his property, when reduced to possession, or, upon the other hand, to deprive appellant's testator, arbitrarily and without due process, of his property rights in his contract, because to do either would violate the Fifth and Fourteenth Amendments to the Constitution, which provide that no person shall be deprived of life, liberty, or property without due process of law. * * *. The considered provision of the act was not an exercise of either an express or implied power of Congress, and was in contravention of a constitutional guaranty.

That statement was also quoted with approval in Lay vs. Lay, (Miss.), 79 Sou., 291.

The Court of Appeals of the District of Columbia said, in passing upon this same fee limitation statute, in Newman vs. Moyers, 47 App. D. C., 102:

> When Congress attempted to reduce the fee called for by plaintiffs' contract, it amounted to taking their property, due them under a private valid contract, and handing it over to another. If this is not deprivation of liberty and property without due process of law it would be difficult to conceive of a case where the inhibition of the Constitution would apply. If this were held to be a valid exercise of vested power by Congress the liberty and property rights of the citizen would be subject to the legislative will. It is difficult to conceive of a more dangerous or tyranical system of government than that which would logically spring into existence if the legislative fiat were held to be supreme.

The Supreme Court of Mississippi quoted the above language with approval in its decision of the same question, in said case of Lay vs. Lay., 79 Sou., 291.

Careful study of the opinion in Ralston vs. Dunaway, 123 Ark., 12; 184 S. W., 425, shows it to be anything but clear, but its line of argument seems to be as follows:

> Payment of the claim could not be compelled even after the Court of Claims had ascertained the sum required to compensate claimant for her private property taken for public use. Hence, payment of the claim by the Government was a purely voluntary act.
>
> Such voluntary act might be accompanied by any condition which Congress might see fit to attach.
>
> The claimant owed no *debt* to the attorneys until appropriation had been made for payment

> of the claim, and, had Congress never made any appropriation, the claimant never would have owed her attorneys anything. The attorney having no cause of action against the claimant prior to such appropriation, he had no rights falling within the protection of the Fifth Amendment.
>
> It must be considered that the contract between claimant and the attorneys was made with reference to the fact that Congress, in making the appropriation, might attach conditions thereto.

Let us analyze that opinion. We admit that no legal compulsion can be exerted upon Congress to enforce the making of *any appropriation,* for *any* purpose. The framers of the Constitution understood that when they provided, Sec. 9, Art. 1:

> No money shall be drawn from the Treasury, but in consequence of appropriations made by law.

They also placed in Sec. 8 of the *same* article, in defining the powers of Congress, the provision that (emphasis ours):

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, *to pay the debts* and provide for the common defense and general welfare of the United States; * * *.

The Constitution recognizes that the Government will or may owe *debts,* even though their payment cannot be compelled. Obviously, Congress has the

power (as distinguished from the *right*) to decline to appropriate money for *any* purpose. It might decline or fail to appropriate for payment for a public building.

That being clearly true, then, per the reasoning of the Arkansas court, any appropriation made in payment for such building would be a purely voluntary act on part of Congress.

Taking another step with the Arkansas court, the making of such appropriation, being purely voluntary on part of Congress, any conditions might be attached to the payment which it might please Congress to enact, such, for example, that no part of the money appropriated to pay the contractor who has erected a public building should be used by that contractor in paying for material or labor used in the performance of his contract, and that any laborer or material-man accepting any part of the sum appropriated or accepting any other money, in payment for services or material used in the construction of the building, should be guilty of a misdemeanor.

As per the reasoning of the Arkansas court, no laborer or material-man would have any cause of complaint, even if the contractor had no other means of paying them, because in making their contracts with the principal contractor, it must be held that they did so with full knowledge that no money could be received by the contractor save pursuant to an appropriation by Congress, and of the power of Congress to lay conditions on any appropriation, and therefore they must have contemplated that Congress might relieve or prevent the contractor from paying

his debts, otherwise than by operation of a uniform bankruptcy law.

It may be said that the case supposed is absurd, but the reasoning follows, step by step, exactly along the argument of the Arkansas court, and for the result so reached, the responsibility is not ours.

We will now briefly consider and analyze the decision of the Virginia Court of Appeals in Calhoun vs. Massie, 124 Va., ——; 97 S. E., 576.

The Virginia Court quotes from the opinion in Gritts vs. Fisher, 224 U. S., 640-648, apparently deeming that case an authority for its decision of the Calhoun-Massie case. Painstaking comparison of the Gritts-Fisher case with the Calhoun-Massie case shows that they have one point of similarity, i. e., each involved the validity of an act of Congress, but that is as far as any analogy can be established.

In the Gritts-Fisher case the point involved was whether an act of 1906 meant to cause the enrollment of Indian children born after a certain date. This court held that it did so contemplate. Then it was argued by Gritts that such enrollment, with the incidental increase in the number of persons who would participate in the final distribution of tribal funds, was in derogation of his own vested right and of those similarly situated.

This court then referred to the fact that *no contractual rights* existed in Gritts and his associates, and said of an earlier act:

> It was but an exercise of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change

> by Congress at any time before it was carried into effect, and while the tribal relations continued.

Just how the decision in the Gritts case can be made even remotely applicable to the Calhoun-Massie case before the Virginia court we do not profess to understand, but the Virginia court says while it is true the Gritts case involved Indian property as to which the United States possesses peculiar and plenary power, the principle therein announced is the same which is involved in the consideration of the fee limitation in the statute here involved.

Another case from which quotation is made by the Virginia court is that of Beers vs. Arkansas, 61 U. S., 527-529, to the effect that the State may either give or withhold its consent to be sued, and that, having given its consent,

> it may withdraw its consent whenever it may suppose that justice to the public requires it.

The giving, withholding, or withdrawing of consent of the United States to be sued is not in any manner involved in this question. Congress did give its consent to the claimants to sue in the Court of Claims; their various claims were presented to that court; the court tried them, and made findings in the nature of an allowance or award, showing the sum required to render to every claimant that just compensation promised by the Constitution for his private property taken for public use. When Congress enacted the appropriation act of 1915, there was no

question of right of suit involved, as the right to sue had been already exercised and pursued to its finality. Hence there was no question involved as to the right of Congress to withdraw its consent that claimants should sue on the claims appropriated for. The appropriations were made *because suits had been brought and determined.* It is plain that the Beers case is utterly without point.

Finally the Virginia court, like the Arkansas court, relies upon the case of Ball vs. Halsell, 161 U. S., 72, and we will here discuss that case and show its lack of application to the subject under consideration in these cases involving the Act of March 4, 1915. The Ball-Halsell case is apparently made the cornerstone of both decisions sustaining the validity of the fee limitation which we are considering.

The Ball-Halsell case presented these facts:

Ball was an attorney, and he contracted with Halsell to prosecute Halsell's Indian depredation claim *for one-half of the amount collected.* The fee contract was different from that of Calhoun with his client, in the instant case, as Calhoun's fee contract provided for payment of a sum *equal to* 50% of collection

The Halsell claim was not a constitutional demand against the United States, but was a claim against an Indian tribe for the illegal depredations committed by members of that tribe on the property of Halsell.

Ball first presented the claim to the Interior Department, but never secured payment through that presentation.

Then, by Act of March 3, 1891 (26 Stats, 851),

Congress provided that persons having such claims might present them to the Court of Claims for adjudication, and that such suits should be brought against the United States and the Indian tribe alleged to be liable; that judgments in favor of claimants should be against the United States and such Indian tribe, and that all such judgments should constitute a charge against tribal funds in the hands of the United States. In short the United States was to be sued solely as guardian of the Indians and not because there was any liability whatever on part of the Government for the depredations of its wards.

That act also provided that counsel fees should be fixed by the Court of Claims, and should not exceed 15% of the judgment save in cases where the judgment was for less than $500, or in cases where services of unusual value had been rendered, in which cases the fee might be 20% of the judgment.

That act opened the door of the Court of Claims to the Indian depredation claims, and as a *condition laid in the same act*, limited attorney fees. Let it be noted, therefore, that, viewing the matter purely from the standpoint of lawyers, they were given by this act a new party defendant (the United States) and a new forum, where the orderly forms of judicial procedure could be followed.

The lawyer who took a case of this class to the Court of Claims knew *in advance*, however, that he must pay a certain price of admission, i. e., the limiting of his counsel fee. Knowing that, if he did not see fit to pursue this new and enlarged remedy, he might decline to proceed.

Ball, however, did bring Halsell's suit under that act; he was allowed a certain fee, and then sued his client for the remainder of his contract fee. This court held, in substance:

> 1. That Ball had no property rights in or under his contract with Halsell, because the contract was itself illegal in that it attempted to vest Ball with an interest in the claim itself from the beginning and was therefore contrary to the terms of Sec. 3477, Rev. Stats., prohibiting assignment of claims or interests therein prior to issuance of warrant in payment of the claim.
> 2. That the provisions with relation to attorney fees constituted a condition laid on the right to sue, and were therefore valid.

Let us now note the differences existing between the Ball-Halsell case and the one at bar.

Ball knew when he brought his client's suit in the Court of Claims that the very act which opened that court to such suit also limited his fee. Calhoun knew when he took his client's case into the Court of Claims that he had a full right under every then existing statute or decision to contract as to his fee without condition or hindrance.

In the Ball-Halsell case the fee limitation was laid *in advance* as a condition on the right to sue on an Indian depredation claim, while in the case at bar, Calhoun's professional services had been rendered and his rights under his fee contract had become vested rights prior to the enactment in question.

The claim which Ball undertook to prosecute for Halsell was not, under the Constitution, a demand

against the United States, being instead a claim sounding in tort against an Indian tribe, while the claim which Calhoun undertook to prosecute for his client was a constitutional demand against the United States for just compensation for private property taken for public use.

Further, Ball never had a valid fee contract with his client, while the fee contract which Calhoun had with his client was valid when it was made; it was valid during the period of several years in which Calhoun was prosecuting the claim in the Court of Claims; it was valid during the time the claim was awaiting appropriation by Congress, and, as we conceive the law to be, is still valid.

While as a measure of caution we have discussed in the appendix to this brief the point that such a Civil War Claim as that of Arnold, and which was prosecuted by defendant in error, is not a gratuity when paid by the United States, we have so placed that discussion as not to form a part of our brief proper, believing that the court will find it unnecessary to consider the authorities cited in said appendix.

In concluding, therefore, our presentation of the matter involved we call attention to the fact that this record contains no intimation of any undue influence on part of defendant in error in securing the fee contracts, first from the original claimant and later from Arnold's administrator. It is in terms admitted in the pleadings below that Calhoun performed the services for which he was employed and that he did so in a proper manner is apparent from the results secured, his services having produced a fund of several thousand dollars for the Arnold estate.

While the decedent and his administrator were under the practical necessity, as pointed out by this court in Taylor vs. Bemiss, of employing counsel, there was no necessity for employing any particular member of the bar. The bar of the Court of Claims, as is a matter of common knowledge, is one made up of a large number of lawyers. Any member of the bar of the highest court of any jurisdiction may be admitted to the bar of that court. The contract made was identical in all essential features with contracts before this court in cases of Stanton vs. Embry and Taylor vs. Bemiss, and sustained as legal and proper and in full accord with sound public policy.

Yet, after years of legal services had been rendered, after Calhoun had concededly fulfilled every duty to his client in the premises, it is attempted by Congress to arbitrarily interfere with and abrogate the contracts made years before, under which these legal services of Calhoun had been rendered, and which had been productive to the claimant of the desired result.

Of the plain and inherent injustice of such action by Congress there is no room for controversy. Interference with the obligations of a contract fully executed on one side is repugnant to that general sense of fairness which brought about the inclusion in the Constitution of the provisions whereon defendant in error here relies for relief from an unjust and iniquitious enactment.

If there is any actual, real and substantial protection to the "liberty" of defendant in error to be found in the Fifth Amendment, then it should assuredly be

held to now protect him when it is sought by Congressional enactment to strike down and destroy that liberty.

The decisions of this court and of other courts to whose opinions weight should be given, are such as entitle him to this relief from an illegal and onerous burden.

If there is any virility and force in the guaranty of the rights of property in the Fifth Amendment, then it should be here called into action to prevent defendant in error from being here despoiled of his fully earned property; to prevent his property from being taken from him, and being presented to another, who claims no ground, save this enactment, for repudiating a written promise to pay him a certain sum, proportioned upon the value of his services.

The provisions in question are plainly such as tend to invite repudiation of fair and lawful contracts, to inculcate in the minds of citizens a disregard for their obligations, and to thereby aggravate one of the most insidious frailties of human nature. The entire effect of this statute, its natural tendency, are malign, because it *prescribes what is wrong, and prohibits that which is right,* thereby failing to fulfill the definition of "law."

That government is a free government just so far as it protects the freedom of its citizen. That government is not free which makes the citizen's tenure of property, whether real or personal, tangible or intangible, depend upon the whim or caprice of any legislative body on earth.

The case here presented to the court is one involv-

ing a question of moment. If it rests within the power of Congress to annul contracts which have been fully executed on one part, contracts previously uniformly upheld by the courts as being in accord with public policy, and as practically necessary to permit government creditors of small means to secure any hearing of their just demands, then the earlier such power becomes generally known, the better, to the end that members of the bar may fully appreciate that no contract entered into with a claimant will protect the rights of counsel, or necessarily form any measure of their ultimate compensation.

The possession of such a power by Congress has never heretofore been claimed or exercised by Congress. It is not believed that it has any constitutional warrant or existence, because its existence and exercise are directly opposed to the guaranties of the Fifth Amendment to the Constitution.

In the light of the statute and decisions cited, it therefore appears that:

1. The fee contract here involved was a legal and valid contract when made. It was a valid and subsisting contract during the period of several years covered by the prosecution of the claim forming the subject-matter of the contract.

2. The right of defendant in error to the agreed compensation of a sum equal to 50 per cent of the sum finally appropriated by Congress in payment of the claim, became *a vested right,* and therefore *property,* at latest when the favorable report of the Court of Claims was secured as the result of the prosecution of the claim before that court by defendant in error.

From these premises only one conclusion is legally deducible, under the provisions of the Fifth Amendment, and that is, the statute in question, insofar as it attempts to deny to Calhoun the right to enforce compliance with his pre-existing valid contract, the consideration whereof had completely passed from him to the plaintiff in error, attempts to take away his property and give it to another, without due process of law; it also operates to deprive him of his liberty of action without due process of law, and is therefore repugnant to said Fifth Amendment.

REPLY TO BRIEF OF PLAINTIFF IN ERROR

Inasmuch as we were not served with a copy of the brief of plaintiff in error, and did not secure a copy thereof until April 26, 1919, it was necessary that we prepare our brief in large measure, and have the same printed, prior to being advised of the exact position to be taken by plaintiff in error, and therefore, we here insert our reply to that brief.

VALIDITY OF CALHOUN'S FEE CONTRACT

We have already considered this point fully, on preceding pages 12 to 26. However, we here emphasize the *difference* between the fee contract in case of Nutt v. Knut (200 U. S. 12), relied upon by plaintiff in error, and the Calhoun fee contract, here involved.

The Nutt fee contract in terms made the fee to be paid a lien, from date of the contract, upon the *"claim"* itself, while under the Calhoun contract no lien was to arise or come into existence until after the warrant in payment of the claim should have issued, *i. e.,* at a time when the warrant might itself be endorsed and passed from one holder to another, like any check.

That phase of the Nutt contract was the very characteristic accentuated by this court in its opinion in that case, where it was stated of that fee contract (emphasis ours):

> In effect or by its operation it transferred or assigned to the attorney, *in advance of the al-*

> *lowance of the claim,* such an interest as would secure the payment of the fee stipulated to be paid. All this was contrary to the statute; for its obvious purpose, in part, was to forbid anyone who was a stranger to the original transaction to come between the claimant and the government, *prior to the allowance of a claim, and who, in asserting his own interest or share in the claim, pending its examination,* might embarrass the conduct of the business on the part of the officers of the government.

In short, under the Nutt contract, the attorney was vested from the start with a *lien on the claim,* while that was not true under the Calhoun contract, and the difference is precisely the difference between invalidity and validity.

Again, it is to be borne in mind that this court in the Nutt case separated the valid portion of the fee contract from the invalid (lien) portion, *and enforced the valid portion,* which was the provision fixing the amount of the fee to be paid. Hence, in any event, the lien portion of any fee contract, identical with the Nutt contract, would be severed from the remainder of the contract, and leave the contract valid in so far as it fixed the sum to be paid to counsel.

As is readily to be seen, therefore, the fee contract in the Nutt case was different from that here involved in matter of the lien provision, so that the decision adverse solely to the lien provision in the Nutt contract is not controlling in the instant case; and, further, this court did not hold the entire Nutt

contract had because of said invalid lien provision, but merely excised the lien provision from the Nutt contract, and then enforced the contract thereby left.

The recovery in the Nutt case was *not* on a *quantum meruit,* as thought by counsel for plaintiff in error. *It was upon the fee contract,* and in accordance with its terms.

Neither was the recovery in McGowan v. Parish (237 U. S. 285) based upon the *quantum meruit,* as stated by opposing counsel. In that case the client had attempted to dismiss his attorneys, and thereby prevented them from completing their services. The attorneys sued for their full agreed compensation, and in deciding favorably to their contention, and in holding that they had not abandoned the case, this court said (emphasis ours):

> Complainants are therefore entitled to compensation; and since the attorneys' services were admittedly of great value, and resulted in securing to Mr. Parish, as this court in effect held in 214 U. S. 124, a complete right to the payment of the money, and since it was his fault, and not theirs, that the final steps to recover it were not taken by them, *no reason is shown why complainants should not receive the entire compensation stipulated for in the contracts. Those instruments may be resorted to as a basis for calculating the compensation of the attorneys, irrespective of any question about their effect as assignments because of Sec.* 3477, *Rev. Stat.* Nutt v. Knut, 200 U. S. 12.

It is obvious that there was no reliance on the *quantum meruit*. Proof of services rendered was submitted merely to show *compliance* by the attorneys so far as permitted by their client, *with the terms of their fee contracts.* As they admittedly had not completed the collection of the claim, recovery on the *quantum meruit* would have been for less than the contract fees, but this court gave a decree for the exact sums called for by the fee contracts.

Plaintiff in error also cites the case of Marshall v. B. & O. R. R. Co., 16 How., 314, where this court said that the act of 1853 (Sec. 3477, R. S.), annulled champertous contracts with agents of private claims.

We are unable to perceive the relevancy of that case. That case involved a contract whereby Marshall agreed to induce the Virginia Legislature to enact legislation desirable to the railroad company, by acting as a secret agent for the company, and by the use of illegitimate methods to influence members of that legislative body. It was purely a "lobbying" contract, and nothing else, and this court held such a contract to be against public policy, and unenforceable.

As compared with that obviously illegal contract, opposed to public policy, note that Calhoun's contract was of a kind often approved by this court. It is clear that the Marshall—B. & O. case has no bearing whatever on the present discussion.

Counsel for plaintiff in error also relies upon the case of Ball v. Halsell (161 U. S. 72), and quotes therefrom to the effect that a contract to give an at-

torney one-half of money recovered from the Government, under which the attorney had performed services before the Interior Department, did not entitle him to that agreed compensation where he prosecuted the claim in the Court of Claims. However, we have fully discussed the Ball-Halsell case on pages 74-77 of our brief. The Ball-Halsell case lacks pertinency to the subject-matter of this discussion.

Where Ball took a contract whereby he was to have one-half *of* the money collected, Calhoun took a contract whereby be was to receive a sum *equal to* one-half of collection. The difference was that *Ball's* original *contract was invalid,* while *Calhoun's contract was valid;* that Ball actually collected the Halsell claim by suit in the Court of Claims brought under an act of Congress that expressly *limited* counsel fees, while Calhoun collected the Arnold claim by suit in the Court of Claims under an act of Congress which *did not limit* counsel fees.

Opposing counsel also quotes from Frisbie v. U. S., 157 U. S. 160. We have covered that case on pages 58-60 of our brief, and have shown that case to have no application here, because that case involved a fee in a *pension* case, *prosecuted under an act of Congress which expressly limited fees in cases prosecuted under that act.*

The question there presented was whether Congress had a right to limit counsel fees in pension cases, and this court held that Congress had absolute power over the entire subject of pensions, but

even that case *did not involve the question of an attempt by Congress to limit counsel fees after performance of the services of counsel.*

On page 13 of his brief learned counsel for plaintiff in error states his inability to distinguish between a claim against the United States for compensation for private property taken, and a claim for a pension. While we do not think the difference is here material, and have therefore covered a discussion of the character of Civil War Claims in the Appendix to this brief, yet the difference has been clearly sketched by this court in Williams v. Heard, 140 U. S., 529, where this court held that claims arising from the taking of property were themselves property, and that such claims

> differ very materially from a claim for a disability pension, to which they are sought to be likened; they are descendible; they are a part of the estate of the original claimants, which in case of their death, would pass to their personal representatives, and be distributable as assets, or might be devised by will; while a claim for a pension is personal, and not susceptible of passing by will, or by operation of law, as personalty.

On the same page opposing counsel urges that the Hall-Halsell case is on all fours with the instant case because the liability of the Government is exactly the same, whether private property be taken for public use, or be merely injured by the wards of the Government (Indians). The difference which seems to have escaped the attention of learned counsel is that the Constitution provides that private property

shall not be taken for public use without just compensation, while neither by Constitution nor otherwise (than by the Indian Depredation Act) has any liability of the Government been recognized for depredations (torts) done by Indians, and even under the Indian Depredation Act, that was a very limited liability assumed by the Government, as we point out on page 61 of this brief.

Referring now especially to the statements found on pages 13 and 14 of brief of plaintiff in error, to the effect that there is no constitutional inhibition against *impairment* of contract obligations by Congress, we have to state that there is no controversy on that point, provided, however, that such impairment is an *incident* to the exercise of a constitutional power of Congress.

As this court has pointed out in the Sinking Fund Cases (U. P. R. R. Co. v. U. S., 99 U. S. 700, and C. P. R. R. Co. v. U. S., 99 U. S. 727), Congress can not use its powers to take away property already acquired, and, as recognized in McGowan v. Parish (237 U. S. 285), the right of counsel to his agreed fee, after he has performed his services, *is property* which goes to his executor, as assets of his estate.

In the case at bar, however, we are not dealing with a statute which merely *impairs* the obligation of a contract; we are considering a statute which in terms *abrogates* a contract already executed on one side, and in effect takes property from one man and gives it to another.

The case of Mitchell v. Clark (110 U. S. 633),

cited by plaintiff in error, really decided nothing save that Congress had power to enact a statute of limitations as to actions based on acts done by or under military authority during the Civil War, and that case has no point here, as no statute of limitations is here involved.

The case of Canada Southern R. R. Co. v. Gebhard (109 U. S. 527), cited by plaintiff in error, involved the validity, under *Canadian* law, of certain action taken in Canada, affecting bonds payable in New York, and in discussing the matter, this court referred to the fact that Congress might pass *bankruptcy* laws, and thereby relieve bankrupts from compliance with their contract obligations. There is no question as to that being true; but that power to pass uniform bankruptcy laws is expressly conferred upon Congress, and as pointed out in the dissenting opinion of Justice Bradley in the Sinking Fund Case of C. P. R. R. Co. v. U. S., 727, the very reason *why* Congress was not prohibited from passing any law impairing the obligations of a contract was the existence of the power of Congress to enact bankruptcy laws, which did necessarily impair the obligations of contracts.

Opposing counsel also cites New Orleans Waterworks Co. v. Louisiana (185 U. S. 336), which merely held that the fact that a *judgment* of a State court might impair the obligation of a contract, did not present a Federal question for review by this court, unless the judgment itself was based upon some *legislative act* passed after the making of the contract.

That case is wholly immaterial to the present discussion.

As to the case of L. & N. R. R. Co. v. Mottley (219 U. S. 467) cited on pages 14-15 of brief of plaintiff in error. That case involved the application of an Act of Congress passed pursuant to the general grant of constitutional power to regulate interstate commerce.

In that case, the railroad company, in settlement of a demand of Mottley, agreed to furnish him and his wife transportation, both within the State of Kentucky, and outside of the State on its lines, so long as they should live. After the enactment of the interstate commerce legislation prohibiting interstate passes, etc., the company declined to issue any more transportation under said agreement. Instead of suing the company to recover damages for breach of contract, or on their original demand, the Mottleys sued for specific performance, and it was held that, the Constitution conferring on Congress power to regulate interstate commerce, all contracts which would by their terms regulate any relations falling within the scope of interstate commerce, must be held to be made with knowledge that Congress might enact legislation impairing the obligation of such contracts.

In that case the court intimated very plainly that Mottley's remedy might be found in a different form of action, and that intimation was carried into effect in the later case of N. Y. C. & H. R. R. R. Co. v. Gray, 239 U. S. 583, where Gray sued a railroad company

for a money judgment, on account of failure of the company to furnish him transportation for a consideration other than money. The railroad company relied on the Mottley case, but this court affirmed the judgment for a money demand, against the company.

We have presented no argument at all inconsistent with the principles of the Mottley and Gray cases. We merely say that those cases have no application or pertinency to the case here presented.

Stated differently, while this court held that Mottley could not demand a pass over the railway, in face of the statute enacted after his agreement with the company, it was held in the Gray case that in view of the necessity for a railway company to decline to keep the letter of its contract calling for transportation, the company might be compelled by suit to compensate in money for the failure or partial failure of consideration originally agreed to pass to the other party. In short, Mottley was not of necessity compelled to really lose anything, but was merely required to change his demand from one for specific performance to one for a money equivalent.

On page 16 of his brief opposing counsel refers to certain decisions of other courts upon this same statute, but his citation is incomplete, and in one particular is inaccurate. It is incomplete in that it contains no reference to the case of Newman v. Moyers, 47 App. D. C. 102, nor to the case Lay v. Lay, 118 Miss., 79 Sou. 291, nor to the case of Black v. O'Hara, 175 Ky. 623, 194 S. W. 811, and for obvious reasons makes no reference to the decision of the Supreme

Court of Florida, rendered April 10, 1919, and after filing of said brief.

The statement is made by opposing counsel, evidently through inadvertence, that the case of Moyers v. Memphis, 135 Tenn. 263; 186 S. W. 105, stopped with the Chancery Court. That case was decided, however, by the Supreme Court of the State of Tennessee, sitting at Jackson, and was the unanimous decision of the court. It was brought before the Chancery Court of Shelby County, and the City of Memphis appealed from that court to the State Supreme Court.

The case cited by opposing counsel in Vol. 43, Washington Law Reporter, 691, was that of Moyers v. Fahey, and was the opinion of Justice Gould of the Supreme Court of the District of Columbia. We had not cited that, because it was the opinion of a trial court.

It was an important decision, however, being the first one rendered upon the constitutionality of the enactment here involved. It was therein held that said enactment was unconstitutional, and in considering it, the Supreme Court of Tennessee in said case of Moyers v. City of Memphis, termed it "a well-considered opinion."

The opinion of Justice Gould in that case, after reviewing the authorities, including most of those cited by opposing counsel in the instant case, concluded as follows:

From the foregoing the conclusions are:

1st. That plaintiffs' fee contract not only violated no express or implied law or policy of Congress, but was one often recognized not only by Congress but by the Supreme Court.

2d. That Congress, in making the appropriation to pay the defendant the compensation provided by the Constitution for the judicially ascertained value of his property taken by the United States, did not bestow a bounty upon him, but paid a judgment debt; that therefore there was no power in Congress to direct how he should spend the money thus paid.

3d. That section 4 of the act in question, deprived plaintiffs of their property without due process of law.

The motion for judgment is granted.

On page 17 of his brief learned counsel for plaintiff in error states that the decisions holding the fee limitation here involved to be unconstitutional are erroneous in that they overlook the fact that this court has held that contracts "of the exact import of Calhoun's were a violation of Section 3477 of the Revised Statutes and were, therefore, void *ab initio.*"

With that statement we must take issue, as this court has in *no* case held that a fee contract like that of Calhoun's was void, either *in toto* or otherwise. We have pointed out wherein fee contracts held bad, either in part or otherwise, were entirely different from that here sued on by Calhoun.

On pages 17 and 18 of his brief, opposing counsel has summed up his contentions. We will refer to

only one thought, doubtless to be drawn from the third statement, to the effect that Calhoun's right under his contract was not a vested right, but was contingent only, and the existence or non-existence of the contingency (payment of the Arnold claim) lay within the wisdom of Congress.

While we have covered that theory, we venture to reiterate the suggestion that the *existence* of a vested *property* right is not dependent upon the present right of *possession* or upon a present right of *action*. A chose in action is property, even though no present right of action thereon exists. A promissory note, not yet due, is property. A fire insurance policy under which there has been no loss, is property. A life insurance policy, while the insured is living, is property.

In concluding this discussion of the subject, which has been as thorough as we could make it, supplemented by an Appendix which may be useful to the court, we submit that the decision of the Kentucky Court of Appeals is well reasoned; it is in accord with the authorities; it has the support of the decisions of four State courts of last resort and of the Court of Appeals of the District of Columbia; it is not only legally correct, but it accomplishes plain justice, in that it requires a citizen to keep a fair and legal contract, made freely and in good faith, and fully executed by the other party thereto.

Respectfully submitted,

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PAYMENT OF CLAIM OF ARNOLD ESTATE BY THE UNITED STATES NOT A GRATUITY.

As this suit is based upon a private contract providing for payment to defendant in error of a certain compensation upon collection of the Arnold claim against the United States; as that claim has been collected, and as the plaintiff in error now has in its hands the balance of that agreed compensation, it would not seem that the nature of the claim which was prosecuted should be deemed material to decision of the case. However, we know that in other cases arising under the same enactment, inquiry has been made by the courts on this point, and for that reason we here discuss the question of the general character of the Civil War claims covered by the appropriation act of March 4, 1915.

We will show that these claims are *not gratuities* in any sense of that term; but that, on the contrary, they are *claims* against the Government for that *"just compensation"* guaranteed by the Fifth Amendment for the taking of private property for public use.

The first and natural object of consideration under this head is the Act making the appropriation in question, in order to ascertain the view which Congress itself took of the nature of the appropriations therein made.

The enacting clause (38 Stats., 962) reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to claimants in this Act named the several sums appropriated herein, the same being in full for and the receipt of the same to be taken and accepted in each case as a full and final release and discharge of their respective claims, except that claimants under this Act receiving compensa-

> tion for use and occupancy of property shall not be barred from further prosecution of claims arising from damages or destruction of the same property, namely:

It will be noted that the receipt by the claimants is to be taken and accepted "as a full and final *release* and *discharge* of their respective *claims.*"

How could there be a *"release"* of a mere gratuity or of a petition for the granting of a gratuity? How could there be a *"discharge"* of a petition for a gratuity? The terms *"release"* and *"discharge"* are obviously wholly inconsistent with any idea of a *gratuity;* they have proper and natural reference to a *claim or demand,* based upon some *consideration.*

It is also to be noted that, as to claims for use and occupation of real estate, mentioned in the concluding portion of the above-quoted enacting clause, it is expressly stated that claimants under this Act receiving *"compensation"* for *use* and *occupancy* shall not be barred from later prosecuting a claim arising from damage to or destruction of the same property.

In other words, Congress, in the very enacting clause of this Act, declared that the sums appropriated were by way of *compensation* for property either taken and used, or occupied.

It is to be further noted, as a material fact, that in Sec. 3 of this same Act, Congress provides:

> "That in case of the death of any claimant, or the death or discharge of the executor or administrator of any claimant herein named, payment of such claims shall be made to the legal representatives: *Provided,* That where a claimant is dead the administrator or executor, or legal representative shall file a certified copy of his bond, which bond must be at least equal in amount to the sum hereby appropriated. * * *"

It would seem plain that, if the money appropriated is to be paid over to an administrator or executor, under his bond,

then the money necessarily becomes *assets of the estate,* subject to distribution after payment of all legal claims or debts due from the estate. This further fact negatives any theory that the money is paid as a *gratuity.*

In short, it is very apparent, right on the face of the appropriation act itself, that this money is being paid as *"compensation"* for property taken and used, belonging to claimants or to their decedents.

In reaching a conclusion as to the intent of Congress in passing any act, it is proper to refer to the reports made on the bill pending before enactment. We refer now to House Report No. 97, 63d Congress, 2d Session, on this Claims Bill.

On page 15, under the heading "Ordinary Individual Claims for Stores and Supplies," the Committee on War Claims of the House of Representatives said:

> Claims of this class are shown by the petitions forming a part of the statements of each case as certified by the Court of Claims to usually embrace such items as horses, mules, cattle, hogs, corn, meat, fodder, fencing used and considered as cordwood, and, in some instances, use and occupation of real estate at regular military posts, sometimes for considerable periods.
>
> In this class of cases, covered by this bill, the Court of Claims has found the persons from whom the property was taken in each case to have been continuously loyal throughout the Civil War, and that the property was taken by proper authority, for use of the army, or, in claims for rent, that the reasonable rental value of the premises occupied during the period of occupancy, with the damages incident to the occupation, amounts to a certain sum.

The committee report on the bill merely confirms the only reasonable conclusion to be drawn from the act itself, and that is, that these appropriations are made as *"compensation"*

for property which was taken and used, under proper authority, for governmental purposes.

In this same connection, and as forming a supplemental report on this same bill, by Senator N. P. Bryan, of Florida, chairman of the Committee on Claims, it may be pertinent to quote his statement of the contents and purport of the bill, taken from the Congressional Record of March 3, 1915, p. 5922, as follows:

Mr. Bryan * * *

> *I make the further statement that, if there is an idea that there are included within the covers of this bill claims which have no foundations, or if it is supposed that any item is in the nature of a gift or gratuity to the proposed beneficiaries, the idea is without foundation in fact. The bill represents compensation for property that was taken from these people by the Government in time of war and under the necessities of war, but property for the taking of which they had a right to believe they would be recompensed; property the payment for which the good faith of the Government of the United States was pledged by its officers when the property was taken and used for the support of the army.*

The propriety of referring to the statement of Senator Bryan, explanatory of the purpose of the bill then pending in the Senate, is shown by similar references to the Congressional Record by this court in cases of Atlantic Coast Line R. Co. vs. Riverside Mills, 219 U. S. 186-200-201, and of U. S. vs. St. Paul, M. & M. R. Co., 247 U. S. 310-316-317.

A further statutory recognition of just such claims as those covered by the Claims Appropriation Act of March 4, 1915, as constituting something wholly different from mere gratuities, is to be found in the acts by which Congress appropriated for payment of claims allowed by the Southern Claims Commission, which Commission is described in the "History of Civil War Claims," in the early portion of this brief.

The Act of March 3, 1875, 18 Stats., Part 3, p. 637, is taken as a sample. The enacting clause of that act is as follows (emphasis ours):

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Treasury be, and he is hereby, authorized and required to pay, out of any moneys in the Treasury not otherwise appropriated, to the several persons in this act named, the several sums mentioned therein, *the same being in full for, and the receipt of the same to be taken and accepted in each case as a full and final discharge of, the several claims presented by such persons to the commissioners of claims* under the Act of March third, eighteen hundred and seventy-one, and reported to the House of Representatives under the said act, that is to say:

There, as as in the enacting clause of the Act of March 4, 1915, we find it provided that the money appropriated shall be taken as constituting a full and final discharge of the claims presented.

As above suggested, there can be no such thing as a "full and final discharge" of a *gratuity.*

It will be noted that, while dealing with a Civil War Claim, prosecuted before that Commission, in the Taylor-Bemiss case (110 U. S., 42), the court speaks of claimants as being *"creditors."* If the *claimant* is a *creditor,* it follows that *his claim is not a gratuity,* but is a claim, either legal or equitable.

On page 7 of the record in this case are quoted the "Conclusions" of the Court of Claims on the Arnold claim, reading as follows:

"CONCLUSIONS."

> "Upon the foregoing findings of fact the court concludes that the claim herein is an equitable one in the sense that the United States received the benefit of the supplies and the use of the property for which claim is made."

It is submitted that this is conclusive of the nature and character of the claim, being the decision of a special tribunal, expressly charged by Congress (Act June 25, 1910, 36 Stat., 837) with the duty of reporting the proven facts

> "together with such conclusions as shall be sufficient to inform Congress of the nature and character of the demand, either as a claim , legal or equitable, or as a gratuity, against the United States."

It will be noted that *"claims"* are divided by that act of Congress into two classes (1) legal, and (2) equitable. If a demand does not fall within the definition of one of those two classes, then it must be a gratuity. The converse is also true. If the demand *is* a *claim, either* legal or equitable, *then it is not a gratuity.*

That conclusion of the Court of Claims is in effect a legal decision, and being the decision of a special tribunal, from the decision of which, in cases referred to it by Congress, there is no appeal to any other tribunal, is final and conclusive.

The fact that the Court of Claims stated its conclusion in the Arnold case, "that the claim herein is an equitable one," and followed that "conclusion" with the explanatory words "in the sense that the United States received the benefit of the supplies and the use of the property for which claim is made," does not detract from the legal effect of the *conclusion.* The words last quoted merely set forth the reasons for the conclusion, and make it plain, also, that the sum named in the findings of fact represented the value of private property taken from the claimant, for public use, for which, under the Fifth Amendment, he was entitled to just compensation.

Assuredly, where an appropriation is made by Congress equal in amount to the judicially ascertained value of private property taken for public use, and when that appropriation is susceptible of identification with the findings and conclusion in a particular case tried by the Court of Claims (as is possible

here, by referring to House Report No. 97, 63d Congress, 2d Session, pages 64-65), it is beyond any controversy that the sum appropriated is paid by the Government as the *"just compensation"* required by the Fifth Amendment, and possesses none of the attributes of a mere donation, gratuity or bounty.

See, also, on this point, the statement of the Supreme Court of Tennessee, in Moyers vs. City of Memphis (135 Tenn. 263):

> We do not agree with learned counsel for defendant, that the claim appropriated for and paid to the city, in this case, was a bounty or a gift; it was in the nature of a debt, and was supported by a good and valuable consideration. It is true that its payment could not be enforced by legal process, and was dependent upon the voluntary action of Congress. But the finding of the Court of Claims, which is attached to the agreement of facts, as Exhibit 3, shows that the claim was based upon "the reasonable rental value of the premises" in question from January 1, 1863, to April 1, 1866, which were taken and occupied by the military authorities of the Federal Government during the Civil War.

In case of Williams vs. Heard, 140 U. S., 529, the court was called upon to decide whether a claim for a part of the fund paid by Great Britain to the United States as a result of the Geneva Award (Alabama Claims) was a mere gratuity, or a property right, passing to an assignee in bankruptcy.

The court stated, in effect, that payment must await the action of Congress, and that no individual claimant had, as a matter of strict legal or equitable right, any lien upon the fund; and that Congress was under no absolute obligation to distribute the fund at all; but the court also said:

> There was, undoubtedly, a moral obligation on the United States to bestow the fund received upon the individuals who had suffered losses at the hands of the

Confederate cruisers; and in this sense all the claims of whatsoever nature were possessed of greater or less pecuniary value. There was at least a possibility of their payment by Congress—an expectancy of interest in the fund, that, is a possibility coupled with an interest.

* * * * * *

There was thus at all times a possibility that the Government would see that they were paid. There was a possibility of their being at some time valuable. They were rights growing out of property; rights, it is true, that were not enforceable until after the passage of the Act of Congress for the distribution of the fund. But the Act of Congress did not create the rights. They had existed at all times since the losses occurred. They were created by reason of losses having been suffered. All that the Act of Congress did was to provide a remedy for the enforcement of the right.

The claims in this case differ very materially from a claim for a disability pension, to which they are sought to be likened; they are descendible; are a part of the estate of the original claimants which, in case of their death, would pass to their personal representatives and be distributable as assets, or might have been devised by will; while a claim for a pension is personal, and not susceptible of passing by will, or by operation of law, as personalty.

It is well recognized as a rule of jurisprudence, that the inadequate nature of a *remedy* for the enforcement of a right, or even the utter absence of remedy for that enforcement, does not alter the character of the right or demand itself.

In case of Grant vs. U. S., 1 Ct. Cl., 41-43-47, a suit was brought during the Civil War by a citizen, to recover compensation for property destroyed by proper military authority, to prevent its falling into the hands of Confederate forces, and a judgment was given for the claimant.

The following statements were there made by the court, in dealing with the general subject of the legal and constitutional obligation of the Government to compensate its citizens

for private property taken for governmental purpose, whether for actual use or merely for destruction:

> Every civilized State recognizes its obligation to make compensation for private property taken under pressure of State necessity, and for the public good. The State is the transcendental proprietary of all the property, real and personal, of its citizens or subjects. This transcendental right—the *eminent domain* of the State in all countries where rights are regulated by law—is so exercised as to work no wrong, to inflict no private injury, without giving the party aggrieved ample redress. This doctrine was not engrafted on the public law to give license to despotic and arbitrary sovereigns. It has its foundation in the organization of societies and States, and is as essential to a republic as to the most absolute despotism. It is of the very essence of sovereignty, and without it a State could not perform its first and highest duty, its own preservation. Vital as is this high prerogative of States, it must be exercised in subordination to the clear principles of justice and right. Whenever, from necessity or policy, a State appropriates to public use the private property of an individual, it is *obliged*, by a law as imperative as that in virtue of which it makes the appropriation, to give to the party aggrieved redress commensurate with the injury he has sustained. Upon any other principle the social compact would work mischief and wrong. The State would have the right to impoverish the citizen it was established to protect; to trample on those rights of property, security for which was one of the great objects of its creation.
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> * * * * * *
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> The letter and spirit of the public, and of the constitutional provision in this regard, require just compensation to be made in every case when private property is *rightfully* taken for public use, whether it be by legislative authority or under the powers necessarily exercised by those commanding our land and naval forces in time of war or imminent public danger. * * * The fundamental law provides that private property shall not be taken for public use without just compensation. * * *

> The obligation to make compensation is coextensive with the right of the State to take private property for public use; and whenever it is taken by competent authority, the obligation of the State can not be evaded.

In that case a judgment was rendered claimant for $41,530. No appeal was taken by the United States, and the judgment became final.

It is to be borne in mind, also, that under the law as it existed when the judgment was entered in the Grant case, the Court of Claims' jurisdiction was confined strictly to the trial of *legal* claims. It had no equity jurisdiction of any kind. Hence, the entry of judgment in the Grant case, and the becoming final of that judgment, is *conclusive* that a Civil War claim was a *legal claim.*

Other claimants would doubtless have fared equally as well had it not been for the later enactment of July 4, 1864 (13 Stats., 381), which prohibited the Court of Claims from exercising any further jurisdiction of claims arising from the operations incident to the Civil War.

That act merely took away the *remedy* previously existing, however; it did not, and could not, change the fact that *the claims of this nature were valid demands against the Government, under the provisions of the Constitution.*

In the case of Mitchell vs. Harmony, 13 How., 115, Justice Taney, in delivering the opinion of the court, said, page 134:

> "There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy, and also where a military officer charged with a particular duty may impress private property into the public service or take it for public use. Unquestionably, in such cases, the Government is bound to make full compensation to the owner."

In the case of United States vs. Russell, 13 Wall., 623-629, Justice Clifford, in delivering the opinion of the court, said:

> "Private property, the Constitution provides, shall not be taken for public use without just compensation, and it is clear that there are few safeguards ordained in the fundamental law against oppressions and the exercise of arbitrary power of more ancient origin or of greater value to the citizen, as the provision for compensation, except in certain extreme cases, is a condition precedent annexed to the right of the Government to deprive the owner of his property without his consent."

After referring to the conditions or emergencies for taking private property for the public service in times of war, etc., the court at the bottom of page 629 says:

> "Such a taking of private property by the Government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger, as heretofore described, is impending; and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the Government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the Government must make full restitution for the sacrifice."

In the case of Erwin vs. United States (97 U. S., 392), it was held that a claim for the proceeds of cotton taken under the Captured and Abandoned Property Act passed to the assignee in bankruptcy. In its opinion in that case the court said:

> "When the appellant filed his petition in bankruptcy his claim against the Government was property, though

of uncertain value. It was a claim for the proceeds of goods which once belonged to him, and of the possession of which he has been deprived by the action of the Government. *Whether this was done rightfully or wrongfully does not affect the character of the claim as property,* though it may affect the validity and value. *Claims for compensation, for the possession, use or appropriation of tangible property, constitute personal estate equally with the property out of which they grow, although the validity of such claims may be denied, and their value may depend upon the uncertainties of litigation, or the doubtful result of an appeal to the Legislature.* A demand of a bankrupt, which is outlawed, must go to the assignee; for contingencies may arise in many ways which will give value to it. *Demands against the Government, if based upon considerations which would be valid between individuals, such as services rendered or goods taken, are property, although there be no court to investigate and pass upon their validity, and their recognition and payment may depend upon the caprice or favor of the Legislature."*

See, also, to similar effect, Phelps vs. McDonald, 99 U. S., 298.

In case of Emerson vs. Hall, 13 Peters, 409-413, the court held that where *services* were *volunteered* to the Government, no obligation on the part of the Government was thereby created, thus following the general rule often applied as between individuals, and the court said:

A claim having no foundation in law, but depending entirely on the generosity of the Government, constitutes no basis for the action of any legal principle. It can not be assigned. It does not go to the administrator as assets. It does not descend to the heir. And if the Government from motives of public policy, or any other considerations, shall think proper, under the circumstances, to make a grant of money to the heirs of the claimant, they receive it as a gift or pure donation. A donation,

it is true, in reference to some meritorious act of their ancestor, but which did not constitute a matter of right against the Government.

Compare the statements above quoted, to the effect that a mere donation or gratuity does *not* go to an administrator, as assets, with the numerous items of appropriation in the War Claims Act, *in express favor of administrators and executors,* and it is very apparent that Congress assuredly did *not* regard these war claims as falling within the definition of a donation or gratuity as described in Emerson vs. Hall.

Further, and as bearing directly on the fact that Congress might have declined to pay these claims, as it did fail to pay them during a period of years, and as showing that such mere power to decline to make an appropriation does not affect the nature or character of the claims themselves, we call attention to the following case:

In Carr vs. State, 127 Ind., 204; 26 N. E., 778; 11 L. R. A., 370, the court said:

> "It can not be true that a State is bound by a contract and yet be true that it has power to cast off its obligation and break its faith, since that would involve the manifest contradiction that a State is bound and yet not bound by its obligation. It may have the might and means of defeating the enforcement of a contract, yet in a just sense, have no power to do so. Might and opportunity do not constitute power in the true sense; to constitute power another element must be present, and that element is right. If right is absent there is no power.
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> * * * * * * *
>
> The Legislature has, therefore, the ability to avoid payment of the obligation of the State by a failure or refusal to make the necessary appropriation, although that body can not impair the obligation of the contract."

The mere fact that Congress might, at its discretion, refuse to pay any of these Civil War claims reported by the Court

of Claims, is wholly immaterial in determining the character of the claims, as Congress has and may exercise the right to *decline* to make an appropriation for payment of any kind of a debt owed by the United States.

Section 9, Article I, of the Constitution, provides that—

> No money shall be drawn from the Treasury, but in consequence of appropriations made by law. * * *

Hence it follows that Congress, by refusal to act, may prevent payment of an absolute judgment, against the Government. By refusal to make an appropriation, Congress might cause the Government to default in payment of interest on United States bonds, or in payment of the principal of said bonds, when due. There is no limit to the power of Congress to prevent payment, by mere refusal to make an appropriation. No writ of mandamus will lie to *compel* Congress to act or to perform *any* duty, no matter how plain that duty may be. An unconstitutional act of Congress may be declared void by the courts, but there is no remedy afforded for the mere *inaction* of Congress, upon any matter.

The mere fact that Congress may refuse to pay *any* obligation of the Government is wholly immaterial in determining the nature of the demand.

The cases above cited surely show that what are commonly called Civil War claims are constitutional demands for "just compensation" for private property taken for public use, and hence they are *not gratuities*.

CASES DISTINGUISHED.

It has been observed, that in practically all the cases which have been briefed on this statute, counsel representing claimants desirous of avoiding compliance with their fee contracts have cited some or all of the cases hereinafter treated.

LEGAL TENDER CASES.

A careful study of the majority opinion in the Legal Tender Cases (Knox vs. Lee, and Parker vs. Davis), 12 Wall., 457, shows that the decision sustaining the Legal Tender Acts, making U. S. Treasury notes a legal tender in payment of debts between individuals, was based primarily on the grounds:

1. That Congress had been given express constitutional power to regulate coinage, and to borrow money, and as a necessary incident to borrowing money, might emit bills of credit, *i. e.*, Treasury notes or bonds.
2. That, in the exercise of any express or necessarily implied power of Congress, that body may choose the means of carrying out such power, and if the *means* chosen do *tend to carry out* the constitutional object of Congress, then such *means* must be held constitutional.
3. That the Legal Tender Acts did *not* impair the obligation of contracts, and therefore did *not* deprive men of their property without due process of law, *because* it must be held that when two persons enter into a contract calling in general terms for payment of a certain sum of money, at a future date, they do so with knowledge of the power of Congress over the subject of coinage, etc., and must be held to agree that the payment provided may be made with whatsoever happens to be legal money at date of payment, even though the gold or silver currency itself may be lighter in the amount of metal contained, or of a less degree of fineness than that in use when the contract is made.

It is to be further noted that the court, in the majority opinion, made it manifest that it considered as of great, if not controlling weight, what were deemed the exigencies of the occasion for the enactment of the acts there in question, and regarded them practically as necessary to the very preservation of the nation.

Again, attention is called to the following statement by the court, in that opinion:

> We have been asked whether Congress can declare that a contract to deliver a quantity of grain may be satisfied by the tender of a less quantity. *Undoubtedly not.* But this is a false analogy. There is a wide distinction between a tender of quantities, or of specific articles, and a tender of legal values.

In the case at bar defendant in error does not assert that, between the date of his contract with his client, and the date of payment of the Arnold claim, Congress might not have changed the weight or fineness of metal coins, or might not have taken such action with relation to legal tender as to have operated, indirectly, to diminish the *value* of his expected and agreed compensation; but the Legal Tender Cases do not sustain in any manner the validity of the enactment here involved, which was enacted for the obvious and express purpose of abrogating in certain particular, enumerated transactions or cases, the contracts between private individuals, not by changing the *means* of payment, but by providing, in effect, that a promise to deliver or pay a certain liquidated number of dollars, should be satisfied by tender or payment of a certain *less number* of dollars.

In connection with the above-quoted statement that Congress could not have provided that a contract to deliver a certain quantity of grain should be satisfied by delivery or tender of a less amount, the court further said:

It can not, therefore, be maintained that the Legal Tender Acts impaired the obligation of contracts.

Yet the act here in question expressly states that fee contracts between counsel and clients shall be satisfied by not more than a certain payment, *"any contract to the contrary notwithstanding."*

This legislation can not be deemed one of the many kinds, falling within the legislative power of Congress, which *indirectly* and *incidentally* impairs the obligation of contracts; this particular act *in terms does so,* with all possible directness. The court, as above seen, in the Legal Tender Cases, said that could *not* be done.

In the later case of Trebilcock vs. Wilson, 12 Wall., 687, the contract involved called for payment of a certain sum of money *"in specie,"* and this court held that said act could not operate to alter the terms of that contract, and that there must be enforced a strict compliance with the terms of the contract, the payment to be made *"in specie."*

It is thus seen that, when the court had squarely presented a case wherein application of the Legal Tender Acts *would* impair the obligation of a contract, it was held that the acts were *inapplicable,* and that, too, *notwithstanding* the express terms of the first act (Feb. 25, 1862, 12 Stats., 345), providing that the Treasury notes to be issued under that act (emphasis ours):

> shall be receivable in payment of all taxes, * * *, and shall also be lawful money and *a legal tender in payment of all debts,* public and private, within the United States, except duties on imports and interest as aforesaid.

In that case the earlier case of Bronson vs. Rodes, 7 Wall., 229, was cited. This earlier case held that a contract to pay

"in gold and silver coin, lawful money of the United States," must be satisfied in *coin*, and not in legal tender notes, the court saying:

> *It is the appropriate function of courts of justice to enforce contracts according to the lawful intent and understanding of the parties.*

In some other cases involving this same fee limitation statute it has been urged by those attempting to sustain its validity that Congress has express power to pay the *debts* of the United States; that Congress has power to choose any means of accomplishing that end; that this appropriation act for payment of these claims allowed by the Court of Claims was enacted pursuant to that power, and hence the appropriation might be accompanied by any desired condition.

It is true that the last paragraph of Art. I, Sec. 8, of the Constitution confers upon Congress the authority to make all laws necessary and proper to execute the other powers of Congress. It is also true that Congress has a wide discretion in its choice of means of carrying its powers into execution, and the means chosen need not be an indispensable means; but the means chosen must be one which itself is not in contravention of any Constitutional provision .

As stated in McCulloch vs. Maryland, 4 Wheat., 316-421, and quoted in First. Bank vs. Fellows, 244 U. S., 416-420 (emphasis ours):

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited, but consist with the letter and spirit of the Constitution,* are constitutional.

In the case at bar, however, Congress has seen fit merely to tack to an appropriation a distinct and separate enactment

designed and in terms expressly stated to be designed, to strike down existing rights, acquired for a valuable consideration, under valid private contracts. This added section of the appropriation act can not be deemed a *means* of paying the debts of the United States.

Further, it does *not* "consist with the letter and spirit of the Constitution."

We do not here question the power of Congress to pay the debts of the United States, and to choose "necessary and proper" means for so doing. *What we question is the right of Congress to add as a rider to an appropriation for payment of national debts, a provision to prevent a citizen from paying his private debts, otherwise than by uniform bankruptcy laws.*

As a means of paying the debt due the Arnold estate, Congress might have provided that payment be made only in Treasury notes, and not in currency, and even though it might so happen that such notes were at a discount, Calhoun could not object. Or, it might have been enacted that payment be made only in certain kinds of bonds, even though they were selling for less than par on the open market.

It does not follow, however, that Congress may attach arbitrary conditions to the payment of the debt, *which conditions do not comprise a means of effecting the payment.*

To illustrate, Congress could not have attached a condition that no part of the money appropriated, when received by the claimant, should be used for payment of any pre-existing indebtedness. It could not have provided that no part of the sum appropriated should be used in payment for articles of attire, or that the claimant should not use any part of the sum paid in the purchase of a residence. Nor could it have provided that a creditor accepting payment of a pre-existing debt, from the fund appropriated, should be guilty of a misdemeanor for so doing.

In short, the mere physical inclusion of an invalid provision in a statute enacted pursuant to constitutional power does not give validity to that which is inherently invalid.

As stated in Wilson vs. New, 243 U. S., 332-345:

> The doing of one thing which is authorized cannot be made the source of an authority to do another thing which there is no power to do.

As soon, as least, as the Treasurer pays over money appropriated in payment of one of these debts of the government, that money becomes just as absolutely the property of the claimant as though he had acquired it in ordinary business. It becomes liable for payment of *his* debts, and may be used by the claimant precisely like any other money owned by him.

SINKING FUND CASES.

As in other cases which have been argued, involving the point here presented, those seeking to sustain the constitutionality of the enactment involved have relied on the "Sinking Fund Cases," Union Pacific Railroad Co. vs. U. S., 99 U. S., 700, and Central Pacific Railroad Co. vs. Gallatin, 99 U. S., 727, we will refer to those cases.

These Sinking Fund Cases presented the question of whether Congress might require the railroad companies to establish a sinking fund for redemption of their bonds, whereon the Government was liable, the Government having loaned its credit to the companies.

The majority of the court sustained the enactment requiring the establishment of this sinking fund, on the ground that Congress had *retained the right to alter or amend the charter or act* of Congress whereunder each company acquired its rights from the federal government, and held that the

reserved right to *amend or alter* the charters of the companies carried with it a right to regulate the business of the companies in any reasonable manner, and therefore did *not* deprive the companies of their property without due process of law.

As exemplifying the legal principles which the court had in mind in deciding the sinking fund cases, we quote the following from the opinion in U. P. R. R. Co. vs. U. S., 99 U. S., 700, the first case decided (emphasis ours):

> The *United States can not*, any more than a State, *interfere with private rights*, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, *but, equally with the States, they are prohibited from depriving persons or corporations of property without due process of law.* * * *

With respect to the reserved power of Congress to amend the company's charter, the court said:

> That this power has a limit, no one can doubt. All agree that it can not be used to take away property already acquired under the operation of its charter, * * *.
>
> Giving full effect to the principles which have thus been authoritatively stated, we think it safe to say, that whatever rules Congress might have prescribed in the original charter for the government of the Corporation in the administration of its affairs, it retained the power to establish by amendment. In so doing *it can not undo what has already been done, and it can not unmake contracts that have already been made, but it may provide for what shall be done in the future*, and may direct what preparation shall be made for the due performance of contracts already entered into. It might originally have prohibited the borrowing of money on mortgage, or might have said that no bonded debt

> should be created without ample provision by sinking fund to meet it at maturity. *Not having done so at first, it can not now by direct legislation vacate mortgages already made under the powers originally granted, nor release debts already contracted. A prohibition now against contracting debts will not avoid debts already incurred.* An amendment making it unlawful to issue bonds payable at a distant day, without at the same time establishing a fund for their ultimate redemption, *will not invalidate a bond already out. All such legislation will be confined in its operation to the future.*

In the second case, of C. P. R. R. Co. vs. Gallatin, 99 U. S., 727, in stating again the ground for the court's opinion, it is said:

> All complaint thus far has come from the Corporation itself, which, to secure the government aid, accepted all the conditions that were attached to the grants, including the reservation of power to amend.

We are unable to see wherein the sinking fund cases tend in any manner to sustain the contention of plaintiff in error, that Congress had a right to do exactly what the decisions in the sinking fund cases say *can not* be done, *i. e., "release debts already contracted,"* or *"avoid debts already incurred."*

BUTTFIELD VS. STRANAHAN.

Another case that has been cited elsewhere in dealing with this subject is that of Buttfield vs. Stranahan, 192 U. S., 470; but scrutiny of that decision shows that it merely holds that, under its express and unlimited constitutional power to regulate commerce with foreign nations (an expressly enumerated power), Congress may absolutely prohibit the importation of specified articles of merchandise, the exact language being as follows (emphasis ours):

> As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States *from consideraions of public policy* does not violate the due process clause of the Constitution.

In that case, again, we have an illustration of a statute restrictive of certain rights, and purely *prospective* in its operation. That act did not provide that certain articles *already imported* should be *exported*. Further, the prohibition there of the importation of an inferior quality of tea was based upon "considerations of *public policy*," while in the cases cited herein this court has held that such contracts as Calhoun made with his client, were in *accord* with *public policy*, and *not* prohibited by that policy.

That case has no apparent relation to or bearing upon the point here involved.

REFUND OF DIRECT TAXES TO STATES.

Wailes vs. Smith, 157 U. S., 271.
Davis vs. Commonwealth, 164 Mass., 241.

By act of March 3, 1891 (26 Stat., 822-823) an appropriation was made for refund to the States of direct taxes collected from them during the Civil War. Those taxes had been constitutionally levied and the refund thereof was purely a matter of *donation* on part of the Government.

It was expressly provided in the appropriation act that the money refunded should be taken in trust, subject to assertion

by individuals who had contributed to the tax originally collected, of their claim on the sum refunded. It was further provided that no money should be paid to any State until its Legislature should, by resolution, have accepted the appropriation with the trusts and conditions annexed. It was further provided that no part of the sums appropriated should be paid to any attorney or agent under any contract for services.

In case of Wailes vs. Smith, 157 U. S., 271, Wailes alleged that he had a contract with Maryland to collect all claims of the State against the Government, and that under said appropriation act Maryland received a certain sum. Wailes sought a mandamus to compel the State Comptroller to draw a warrant for payment of the asserted fee.

The Maryland Court of Appeals (76 Md., 475) decided against Wailes on the grounds:

1. The duty of the Comptroller, being discretionary, could not be controlled by mandamus.
2. No money could be paid out save pursuant to a legislative appropriation, and there was no such appropriation.
3. Payment could not be made out of the particular fund received by the State, as the fund had been accepted subject to the conditions imposed by Congress.
4. The contract between Wailes and the State contemplated prosecution of *claims* of the State, and it had no *claim* for refund of the direct tax, as that tax had been lawfully imposed on the State. Hence, Wailes' contract did not cover his demand.

While there was some discussion of the merits of the case in the opinion of this court, *it was considered on motion to dismiss, on the ground that no federal question was involved, and that motion was allowed, this court saying:*

> The finding of the Maryland court of appeals, that there was no fund in the State treasury upon which the Comptroller could lawfully draw his warrant, because there had been no appropriation made by the State Legislature for the payment of the commissions here claimed, was decisive of the case and involved no federal question.

The quoted paragraph was therefore really the entire judgment of this court in that case.

In case of Davis vs. Commonwealth, 164 Mass., 241, it appeared that Davis had a contract with Massachusetts to act as agent for it and was to receive a certain percentage of the sum received by the State. He sued the State for his compensation in a State court.

The court intimated very pointedly that, after the money had been actually received by the State, it became the absolute owner of the money, with power to do what it pleased with it, there being no actual trust in favor of private persons, as the direct tax had been paid by that State out of general funds, and not by special taxes laid on its people.

The court sustained Davis' contract, so far as it bound the State to pay him a certain sum, but suggested that substantial justice might be done by paying Davis from other funds of the State, thereby avoiding any conflict with the act of Congress, while at the same time satisfying Davis' claim.

The court said:

> If the petitioner has performed his contract with the Commonwealth, and according to the terms of the contract has become entitled to his compensation, we think it would be no defense for the Commonwealth that it had promised the United States that it would not pay him his compensation.

It is to be borne in mind, however, that those appropriations were not made in payment of any judicially ascertained debt

of the United States, forming a constitutional claim for just compensation for property taken for public use. The services rendered by agents or representatives of the States were rendered solely before Congress, in securing a Congressional donation or gratuity, and Congress saw fit to accompany the donation with a certain trust in favor of taxpayers who had contributed to payment by the States of the funds repaid.

If these two cases have any bearing at all on the case at bar, they are assuredly not adverse to any contention we have made.

CAPITAL TRUST COMPANY, ADMINISTRATOR OF ARNOLD, *v.* CALHOUN.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 368. Argued May 2, 1919.—Decided June 2, 1919.

For the prosecution of a claim for taking and use of private property in the Civil War, claimant agreed to pay an attorney's fee of 50% of the amount to be collected, to be a lien on any warrant to be issued in payment of the claim; the bill was referred by the Senate under § 14 of the Act of March 3, 1887, c. 359, 24 Stat. 505, now Jud. Code, § 151, to the Court of Claims, where, after evidence and trial, favorable findings were secured, upon which Congress appropriated an amount in payment, but with the restriction that no part thereof in excess of 20% should be paid to or received by any attorney on account of services rendered in connection with the claim, the act further declaring it a misdemeanor for any attorney to exact or receive for such services any sum exceeding that percentage of the amount appropriated, any contract to the contrary notwithstanding.

208. Argument for Defendant in Error.

Assuming the provision for a lien not violative of Rev. Stats., § 3477, and the contract valid when made, *held*, that while the attorney's right to collect his fee from other assets of the client was not affected, the restriction, as to the fund appropriated, was within the power of Congress, and did not deprive him of property or of liberty of contract without due process, although subsequent to the making of the contract and rendition of the services. P. 217.

177 Kentucky, 518, reversed.

THE case is stated in the opinion.

Mr. T. L. Edelen for plaintiff in error.

Mr. Joseph W. Bailey and *Mr. Charles F. Consaul* for defendant in error:

It is maintained by defendant in error that the provisions of § 4, of the Act of March 4, 1915, denying his right to collect from his former client the full compensation due under a valid contract, for his professional services rendered prior to the enactment, and making him liable to punishment for a misdemeanor in event he either compels or accepts compliance with the terms of such valid contract, are in direct derogation of his rights under the Fifth Amendment, in that the statute attempts to deprive defendant in error of his property and liberty without due process of law.

Defendant in error does not contend that, by reason of his services rendered under his contract, he acquired any right of property as against the United States. The property right so acquired is against the Arnold estate. The claim having been investigated and tried in the Court of Claims, and an appropriation having been made by Congress for payment of the sum awarded, and payment having actually been made, the amount appropriated (less the 20 per cent. received,) now in the hands of the administrator of the Arnold estate, is chargeable with payment of the residue of the agreed fee.

This right of property was acquired and held under and by virtue of professional services rendered, in accordance with a valid contract, having express statutory sanction, in no manner opposed to public policy, and was acquired prior to the enactment in question. At least from date of allowance of the claim by the Court of Claims, Calhoun had a chose in action, as against his client, under his valid contract whereunder he had completed his services. That a right of property is thus acquired by counsel has been recognized by the courts. *McGowan* v. *Parish*, 237 U. S. 285.

The instant the act was approved by the President, every individual claimant therein named became the owner of the sum appropriated to him. He could, on refusal by the Treasury officials to pay his claim, secure a mandamus compelling payment. *United States ex rel. Parish* v. *MacVeagh*, 214 U. S. 124; *Osborn* v. *Nicholson*, 13 Wall. 654.

Decisions opposed to our position herein (*Ralston* v. *Dunaway*, 123 Arkansas, 12; *Calhoun* v. *Massie*, 123 Virginia, 673) holding that counsel could acquire by their performance of services under valid contracts, no rights whereof they might not be divested by act of Congress at any time prior to actual payment of the claim, overlook the legal principle that the fee contract constituted a chose in action, and further, that a chose in action is property, regardless of whether or not there exists a present right to sue thereon. It is within the bounds of reason to say that the rights of Calhoun became vested as soon as he accepted the employment and began rendering his services. *Price* v. *Haeberle*, 25 Mo. App. 201.

It is plain that the right becomes a vested property right at least on the securing of a favorable report or allowance of the claim at the hands of the Court of Claims. *Roberts* v. *Consaul*, 24 App. D. C. 551, 559; *Schooner Zilpha*, 40 Ct. Clms. 200.

The uncertainty as to time of payment, or even the possible uncertainty as to whether Congress may appropriate for the entire amount reported, does not affect the character of this vested or property right, although it may affect its extent or value. As the claim itself constituted property, which admittedly goes to the administrator, *Erwin* v. *United States*, 97 U. S. 392, the rights of Calhoun to his compensation must likewise be property, like an estate in contingent remainder, or the interest of an assured under a policy of life insurance.

If Calhoun had died prior to payment of the claim, his property right would have passed as such to his administrator or executor, and could have been enforced. *McGowan* v. *Parish*, *supra*.

Legislation impairing property rights in contracts violates the Fifth Amendment.

In a certain sense it may be said that the statute here involved does not directly impair the liberty of making a contract, but it does in terms operate to deprive defendant in error of his liberty of either enforcing compliance by his client with the terms of a valid contract, or even of accepting from an honest client the agreed compensation in excess of a sum equal to 20% of the sum collected upon a claim.

With reference to what the court said in *Ex parte Garland*, 4 Wall. 333, it may be pertinently asked of what value is the right to appear in court and argue causes for suitors, if, after the attorney has performed these functions of his profession, he can be deprived by act of Congress of the fruits of his labors?

The limitation of attorney fees in pension cases was purely prospective in its operation. The theory of the court in *Frisbie* v. *United States*, 157 U. S. 160, was that, in granting or extending a privilege, Congress may simultaneously lay certain conditions upon persons, either claimants or counsel, availing themselves of such privi-

lege or extension. It by no means follows, however, that Congress may impose such conditions upon counsel, after services have been fully rendered, under valid contracts, and make such conditions practically retroactive in a manner to deprive counsel of their property rights, acquired under their contracts, and enforceable against their clients.

The limitation of counsel fees in Indian depredation claims was sustained, in *Ball* v. *Halsell*, 161 U. S. 72, as being a condition laid by Congress on the right to sue. That act did not, like the one here, seek to enact such limitation after the suit had been conducted to a termination in the Court of Claims.

In the following cases the present fee limitation has been adjudged unconstitutional and void: *Moyers* v. *Memphis*, 135 Tennessee, 263; *Black* v. *O'Hara, Admr.*, 175 Kentucky, 623; *Lay* v. *Lay*, 118 Mississippi, 549; *Newman* v. *Moyers*, 47 App. D. C. 102; *King* v. *Pons, Admr.*, 77 Florida,——. In two cases, it was sustained: *Ralston* v. *Dunaway*, 123 Arkansas, 12; *Calhoun* v. *Massie*, 123 Virginia, 673. Obviously, Congress has the power (as distinguished from the right) to decline to *appropriate* money for any purpose.

Mr. Justice McKenna delivered the opinion of the court.

Proceeding in equity under the law of Kentucky for an accounting from the Capital Trust Company as administrator *de bonis non* of the estate of Thomas N. Arnold, deceased, and that the estate be settled and distributed.

Defendant in error Calhoun and Calhoun & Sizer, a firm composed of C. C. Calhoun and Adrian Sizer, attorneys at law, appeared in the proceeding and by cross-petition prayed judgment against the trust company as such administrator for the sum of $1504.50, with interest from July 10, 1915.

An outline of the facts is as follows: Thomas N. Arnold, prior to his death, believing that he had a just claim against the United States, entered into a contract with the firm of Calhoun & Sizer and employed it to undertake the prosecution of the claim, and on August 1, 1905, entered into a written contract with it by which, in consideration of the services rendered and to be rendered by it in the prosecution of the claim, he agreed to pay it a fee equal in amount to 50% of whatever sum of money should be awarded or collected on the claim, the payment of which was made a lien upon the claim or upon any draft or evidence of payment that might be issued in liquidation thereof.

The firm undertook the prosecution of the claim and bills were introduced in Congress for its payment, and on May 22, 1908, it was referred to the Court of Claims by a resolution of the United States Senate for findings of fact under § 14 of the Act of March 3, 1887, c. 359, 24 Stat. 505, now § 151 of the Judicial Code. About that time the firm of Calhoun & Sizer was dissolved and subsequently Arnold died and the beneficiaries of the estate entered into a written contract with defendant in error, C. C. Calhoun, to continue the prosecution of the claim and agreed to pay him 50% of the amount which might be collected, the fee to be a lien "on any warrant" which might "be issued in payment of said claim."

January 15, 1912, the Court of Claims made findings of fact in the matter of the claim and stated the amount thereof as $5015.00. The court's findings were certified to Congress and that body, by an Act approved March 4, 1915, c. 140, 38 Stat. 962, made an appropriation for the payment of the claim and the Secretary of the Treasury was directed to pay it.

The act, however, contained the following provisions:

"That no part of the amount of any item appropriated in this bill in excess of twenty per centum thereof shall be

paid or delivered to or received by any agent or agents, attorney or attorneys on account of services rendered or advances made in connection with said claim.

"It shall be unlawful for any agent or agents, attorney or attorneys to exact, collect, withhold or receive any sum which in the aggregate exceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding $1000."

June 7, 1915, Calhoun requested the Secretary of the Treasury to issue a warrant to him for the sum of $1003, which he recited was to be payable to him on account of services as attorney in the claim of the Capital Trust Company against the United States, as appropriated for by the act of Congress, the receipt of said warrant to be taken and accepted as a full and final release and discharge of any claim he had against the United States on account of services in said claim.

Afterward, on July 1, 1915, notice was given to Calhoun, as attorney for the claimant, that in settlement of the claim a check was mailed him for $1003, being 20% of the claim, and to the trust company as administrator *de bonis non* of Arnold, check for $4012. A part of this money is still in the hands of such administrator and there is no other property belonging to the estate.

The cross petition additionally asserts the following: No part of the fee except the sum of $1003 has been paid and there is a balance due of $1504.50, with interest from July, 1915, the date the money was received by the trust company.

July 10, 1915, Calhoun presented his claim to the administrator duly proved and demanded payment, but payment was refused. The whole of the $1504.50, there-

fore, remains unpaid, and Calhoun has a lien upon the fund for the payment, he having accepted the check for $1003 under protest and only on account. The contract preceded the act of Congress and when the act was passed such contracts were lawful and Congress was without authority to take from him his property without due process of law or just compensation therefor or to deprive him of his liberty of contract.

This is repeated and emphasized in various ways and the Fifth Amendment is especially invoked as sustaining it, and for which reasons it is alleged that the "attempted limitation of attorney's fees by said act" was "null and void."

A demurrer to the cross petition was overruled and the trust company answered. A detail of its averments is not necessary. It practically admits those of the cross-petition and pleads in defense the provisions of the act of Congress, and also § 3477, Rev. Stats.

A demurrer was sustained to the answer and judgment rendered for Calhoun for the sum of $1504.50, with interest from July 1, 1915. The judgment was affirmed by the Court of Appeals. The court said: "This case runs on all fours with *Black* v. *O'Hara's Admr.*, 175 Ky. 623, where it was held that the Act of Congress approved March 4, 1915, appropriating money for the payment of similar claims and containing a similar provision limiting an attorney's fee to twenty per cent. of the amount recovered, in so far as it attempted to limit the amount of a fee theretofore earned, was unconstitutional and invalid.

"We have been urged to recede from the rule announced in *Black* v. *O'Hara's Admr.*, *supra*, as being unsound in principle; but after a careful reconsideration of the reasoning by which the decision in that case is supported, we are satisfied of its soundness, and reaffirm it."

We encounter at the outset a question upon the form

of the judgment. The cross-petition was presented in a proceeding to require an accounting of the administrator of Arnold and the petition asserted a claim and lien upon the money in the administrator's hands received from the United States Government. The judgment, however, does not refer to that money or the lien upon it; it provides only that Calhoun recover of the administrator "the sum of fifteen hundred and four 50/100 dollars with interest from July 1st, 1915, and his costs herein and may have execution," etc.

If the judgment only establishes a claim against the administrator to be satisfied, not out of the moneys received from the United States but from other assets of the estate, a situation is presented which it was said in *Nutt* v. *Knut*, 200 U. S. 12, 21, would not encounter legal objection. In other words, the limitation in the act appropriating the money to 20% as the amount to be paid to an agent or attorney would have no application or be involved.

But the judgment is construed by the parties as having more specific operation, construed as subjecting the money received from the Government to the payment of the balance of Calhoun's fee, doubtless because the estate has no other property. On that account it is attacked by the trust company and defended by Calhoun. The controversy thus presented is discussed by counsel in two propositions: (1) The validity of the contract independently of the limitation imposed by Congress upon the appropriated money; (2) the power of Congress to impose the limitation as to that money. The latter we regard as the main and determining proposition; the other may be conceded, certainly so far as fixing the amount of compensation for Calhoun's services (we say Calhoun's services as the appearance of the firm of Calhoun & Sizer was withdrawn), and even so far as the contract provided for a lien, if the distinction made by counsel be tenable—that

is, a distinction between a lien on the claim and a lien "upon any draft, money, or other evidence of payment," to quote from the first agreement, or "on any warrant which may be issued in payment," to quote from the second agreement.

So far as the contract fixed the amount of fee it is within the rule of *Nutt* v. *Knut, supra*, and, for the sake of the argument, the lien may be conceded to be valid against § 3477, Rev. Stats., to the contrary if it be regarded as having been given not upon the claim but upon its evidence, as counsel contend. It may, therefore, not only escape the defect that was held fatal to the lien asserted in *Nutt* v. *Knut*, but may claim the support of *McGowan* v. *Parish*, 237 U. S. 285.

We, however, need not dwell upon the distinctions (their soundness may be disputed) nor upon the contentions based upon them, because, as we have said, we consider the other proposition, that is, the power of Congress over the appropriated money and the limitation of payment out of it to an agent or attorney to 20% of the claim, to be the decisive one.

In its discussion counsel for Calhoun have gone far afield and have invoked many propositions of broad generality—have even adduced as impliedly against the power, if we understand counsel, the constitution of the Court of Claims and its jurisdiction as weight in the same direction.

We can only instance some of the points of the argument. The Act of February 26, 1853, c. 80, 10 Stat. 161, now § 823, Rev. Stats., is cited as recognizing the right of attorneys to compensation for their services in claims against the United States, and it is said that contracts for such compensation have been universally sanctioned as legal. And, further, official statements are adduced to the effect that the Court of Claims is so constituted "that the successful prosecution of a claim" in it "is something more than a merely perfunctory performance on part of

counsel"; it is "a matter of great business hazard and risk to counsel when done upon purely contingent fees." And in many cases, it is further urged, no other than contingent fees are possible and to deny them is practically to deny the right to counsel. Mr. Justice Miller is quoted from, in *Taylor* v. *Bemiss*, 110 U. S. 42, in illustration of such result and its injury.

The right to counsel being thus recognized, and recognized antecedently to the contract now involved, it became, counsel contend, a "pre-existing valid right," and to take it away is to divest the right—to take it away is to deprive of property of value assured of protection by the Constitution of the United States. To sustain the contentions a number of state cases are cited. Among them is *Black* v. *O'Hara, Admr.*, 175 Kentucky, 623, the case which the Court of Appeals regarded as authority for its ruling in the present case.

In a general sense there is force and much appeal in the contentions, but we think they carry us into considerations beyond our cognizance. Liberty in any of its exertions and its protection by the Constitution are of concern. The right to bind by contract and require performance of the contract are examples of that liberty and that protection and they might have resistless force against any interfering or impairing legislation if the contest in the case was simply one between Calhoun and the Arnold estate. But there are other elements to be considered—there is the element of the condition Congress imposed on the subject-matter of the controversy regarded as a condition of its grant. Relief could only be had through legislation. This was petitioned and the Senate of the United States was prompted to refer the claim to the Court of Claims. A defect of remedy remained even after the court had been thus invoked and had reported the amount and facts of the claim. Further legislation was necessary, but it could not have been compelled; it

was optional, not compulsory; and it would seem to require no argument to convince that the terms of its enactment must be taken as expressed and the relief it granted accepted with the condition imposed upon it. Indeed, the proposition is confused by its discussion. And it is certainly difficult to deal with the distinction that counsel make between preëxisting and prospective transactions. The right is absolute and universal and necessarily must be to have any strength at all. It is only arbitrary in the sense that many of the faculties of government are. And we have seen there was exertion of one of its powers in the present case—not, however, to interfere with or lessen the asserted obligation of the contract between Arnold and Calhoun, but to limit only the application of the money gratuitously appropriated in the payment of attorneys' fees. The contention is that this cannot be done, or, to put it another way, that the appropriation, though it could not be compelled, was yet subservient to the contract of Calhoun (and, we may interject, if for 50%, for any per cent. or terms) and that he was entitled to all the contract provided, denuded of the condition imposed upon the appropriation.

The contention has no legal basis, and it may be said it has no equitable one. Neither the justice nor the policy of what sovereignty may do or omit to do can be judged from partial views or particular instances. It is easy to conceive what difficulties beset and what circumstances had to be considered in legislating upon such claims. Definite dispositions were matters of reflection and, it may be, experience—imposition was to be protected against as well as just claims provided for, and, considering claimants and their attorneys in the circumstances, it may have seemed to Congress that the limitation imposed was fully justified, that 20% of the amounts appropriated would be a proper adjustment between them. We are not concerned, however, to accuse or defend. Whatever might have been

the moving considerations, the power exercised must be sustained. *Frisbie* v. *United States*, 157 U. S. 160; *Ball* v. *Halsell*, 161 U. S. 72.

The first case dealt with conditions upon pension legislation; the second concerned a claim against the United States on account of Indian depredations. It is, therefore, contended that they are unlike Calhoun's contract with Arnold and that their principle is not applicable. We think otherwise. The legislation passed on was sustained as within the power of government.

We conclude, therefore, that Calhoun's claim for a balance due as fees cannot be paid out of the moneys appropriated by Congress and now in the hands of the administrator *de bonis non*, or recognized as having any validity as against that fund. Beyond this we need not go.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE HOLMES concurs in the result.

MR. JUSTICE MCREYNOLDS took no part in the decision.